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In The

Supreme Court of the United States

October Term, 1989

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., ABERBACH ENTERPRISES, LTD., ACUFF-ROSE-OPRYLAND MUSIC, INC., MILENE-OPRYLAND MUSIC, INC., WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc., FRED ROSE MUSIC, INC., and MILENE MUSIC, INC.,

Petitioners,

vs.

CATHY YVONNE STONE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. WHETHER THE SECOND CIRCUIT'S FAILURE TO APPLY ANY DISCERNIBLE OR ARTICULATED STANDARD OF REVIEW OF THE DISTRICT COURT'S DECISION TO DISMISS THE COMPLAINT ON GROUNDS OF LACHES, WHICH CONFLICTS WITH ITS OWN EARLIER STANDARD OF REVIEW AND THE ABUSE OF DISCRETION STANDARD OF REVIEW IN OTHER CIRCUITS, IS REVERSIBLE ERROR.

2. WHETHER THE ABUSE OF DISCRETION STANDARD FOR APPELLATE REVIEW OF A DISTRICT COURT DECISION TO DISMISS A COMPLAINT ON GROUNDS OF LACHES IS TO BE ALTERED BECAUSE THE MATTER ARISES IN A SUMMARY JUDGMENT PROCEEDING IN WHICH THE DISTRICT COURT ENGAGED IN A FACT-INTENSIVE INQUIRY WITH EXTENSIVE FACTFINDING.

3. WHETHER IT IS A USURPATION OF A DISTRICT COURT'S POWER FOR A COURT OF APPEALS, WHEN REVIEWING A DISTRICT COURT'S EXERCISE OF EQUITABLE DISCRETION, TO GO OUTSIDE THE RECORD AND TO RELY ON "FACTS" FOUND BY A STATE SUPREME COURT RATHER THAN TO REQUIRE AN APPELLANT TO UTILIZE RULE 60(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND INITIATE PROCEEDINGS IN THE DISTRICT COURT, THE APPROPRIATE FEDERAL FACTFINDING FORUM.

I. QUESTIONS PRESENTED – Continued

4. WHETHER A COURT OF APPEALS MAY, WITHOUT REGARD TO TIME DEADLINES, WITHDRAW ITS MANDATE AND ALLOW SUCCESSIVE REHEARINGS, AND, IF SO, WHAT CONSTRAINTS EXIST ON THE EXERCISE OF THAT POWER.

5. WHETHER, UNDER FED. R. APP. P. 40(A), A COURT OF APPEALS CAN GRANT A PETITION FOR REHEARING BASED UPON "FACTS" ARISING AFTER ITS INITIAL JUDGMENT.

6. WHETHER, BY ANALOGY TO *GRIGGS V. PROVIDENT CONSUMER DISCOUNT CO.*, THE FILING OF A PETITION FOR A WRIT OF CERTIORARI TERMINATES THE JURISDICTION OF A COURT OF APPEALS TO ADJUDICATE NON-ANCILLIARY MATTERS.

7. WHETHER THE DENIAL OF A PETITION FOR A WRIT OF CERTIORARI TERMINATES THE LITIGATION, OTHER THAN THROUGH A RULE 60(B) PROCEEDING IN THE DISTRICT COURT, OR WHETHER A COURT OF APPEALS CAN, ON A SECOND REHEARING AFTER A DENIAL OF CERTIORARI, REVERSE ITS EARLIER DECISION ON FACTS THAT WERE PRESENTED TO THIS COURT IN THE UNSUCCESSFUL PETITION FOR CERTIORARI.

II. PARTIES TO THE PROCEEDINGS

The parties to the proceedings as they appeared below are set forth in the caption hereof. However, since the commencement of this action certain of the Petitioners have undergone corporate name changes, mergers and/or acquisitions. These changes are set forth below. In accordance with Supreme Court Rule 29.1, the parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of the corporate Petitioners were listed in Petitioner's Application for Extension of Time, No. A-518, to which this Court is respectfully referred.

Subsequent to the filing of this action, Petitioner Acuff-Rose-Opryland Music, Inc. changed its name to Acuff-Rose Music, Inc. and Petitioner Milene-Opryland Music, Inc. changed its name to Milene Music, Inc. Petitioners Fred Rose Music, Inc. and Milene Music, Inc. have been dissolved and their assets distributed to Petitioners Wesley H. Rose and Roy Acuff as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc. Petitioner Chappell & Co., Inc. has changed its name to Warner/Chappell Music, Inc.

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HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., ABERBACH ENTERPRISES, LTD., ACUFF-ROSE-OPRYLAND MUSIC, INC., MILENE-OPRYLAND MUSIC, INC., WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc., FRED ROSE MUSIC, INC., and MILENE MUSIC, INC.,

Petitioners,

vs.

CATHY YVONNE STONE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, contained in its Opinion on Petition for Rehearing, decided December 5, 1989, in the matter of *Cathy Yvonne Stone v. Hank Williams, Jr., et al,* No. 88-7860. The Court is also respectfully referred to the inextricably related Petition for

writ of Certiorari in the matter of *Randall Hank Williams v. Catherine Yvonne Stone*, filed with this Court on March 30, 1990.

IV. JUDGMENTS BELOW

The judgment and opinion on second Petition for Rehearing in the matter of *Cathy Yvonne Stone vs. Hank Williams, Jr., et al.*, Docket No. 88-7860, was entered by the United States Court of Appeals for the Second Circuit on December 5, 1989 and is reported at 891 F.2d 401 (2d Cir. 1989). A copy of the judgment and opinion is also appended hereto as Appendix A-1. (The Appendix hereto shall hereinafter be referred to as "App."). The original judgment and opinion of the Second Circuit, dated April 21, 1989, which was vacated by the above, is reported at 873 F.2d 620 (2d Cir. 1989) and a copy thereof is appended hereto as App. B-1. This Court's denial of Respondent's petition for writ of certiorari is reported at 110 S.Ct. 377 (1989), and notice thereof is appended hereto as App. F-3. The opinion and order of the United States District Court for the Southern District of New York in the matter of *Cathy Yvonne Stone v. Hank Williams, Jr., et al.*, Civil Action No. 85 Civ. 7133 (JFK), dated September 6, 1988, is unreported but is appended hereto as App. C-1.

V. JURISDICTION

Petitioners seek review of the judgment on Petition for Rehearing of the United States Court of Appeals for the Second Circuit entered on December 5, 1989 in the case of *Cathy Yvonne Stone v. Hank Williams, Jr., et al.*, Docket No. 88-7860. By order, dated January 19, 1990, this Court granted an extension of time within which to file this Petition for Writ of Certiorari to and including April 4, 1990. (App. D-1). Jurisdiction to review the judgment of the United States Court of Appeals for the Second Circuit, dated December 5, 1989, by writ of certiorari is conferred upon this Court by 28 U.S.C. §1254(1).

VI. STATUTES INVOLVED

Rule 40(a) of the Federal Rules of Appellate Procedure provides, in pertinent part, as follows:

> Rule 40. **Petition for Rehearing.**
> **(a) Time for Filing; Content; Answer; Action by Court if Granted.** A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present.

Rule 60(b) of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> Rule 60. **Relief From Judgment or Order.**
> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2)newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

VII

STATEMENT OF THE CASE

A. STATEMENT OF MATERIAL FACTS

This is an action for declaratory judgment and ancillary relief with respect to Respondent's alleged entitlement to an interest in the renewal term of copyright in musical compositions written by Hiriam "Hank" Williams ("Williams, Sr."). Respondent bases her entitlement upon her alleged status as the illegitimate daughter of Williams, Sr. who died on January 1, 1953, five days before Respondent's birth. (App. at C-1.2).

Williams, Sr. composed more than one hundred (100) musical compositions (the "Works") prior to his death. Williams, Sr. assigned the Works and the copyrights therein to Acuff-Rose Publications, the predecessor to Petitioners Acuff-Rose-Opryland Music, Inc., Milene-Opryland Music, Inc., Wesley H. Rose, Roy Acuff, Fred Rose Music, Inc. and Milene Music, Inc. (the "Acuff-Rose Petitioners"). (App. at C-1.3). Petitioner Fred Rose Music, Inc. acquired the interest of Williams, Sr.'s then minor child, Petitioner Randall Hank Williams, Jr. ("Williams, Jr."), in the renewal term rights in the Works.[1] Billie Jean Williams Berlin ("Berlin") is the widow of Williams, Sr. Petitioner Aberbach Enterprises, Ltd. is the assignee of Berlin's interest in the renewal term rights in the Works. (App. at C-1.2 and C-1.3). The Berlin renewal term rights in the Works are administered by Petitioner Chappell Music Company.

The renewal term of copyright in the Works has been duly obtained by or on behalf of the Acuff-Rose Petitioners and/or Petitioner Aberbach, as the assignees of Williams, Jr. and Berlin. The individual Acuff-Rose

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[1] Petitioners Acuff-Rose-Opryland Music, Inc. and Milene-Opryland Music, Inc. acquired the interest of the remaining Acuff-Rose Petitioners in the Works in May 1985.

Petitioners and Petitioner Aberbach have exercised dominion and control over their respective interests in the renewal term copyrights in the Works since each such petitioner obtained such interest. (App. at C-1.11).

Respondent was born on January 6, 1953 in Montgomery, Alabama to Bobbie W. Jett, an unmarried woman. (App. at C-1.5). Respondent was adopted by Williams, Sr.'s mother, Mrs. Lillian Stone, and her husband, and following Mrs. Stone's death in 1955, was subsequently adopted by George Wayne Deupree and Mary Louise Sims Deupree of Mobile, Alabama.

In 1967, proceedings were commenced in the Circuit Court of Montgomery County, Alabama in the Williams, Sr. estate and the guardianship estate of Williams, Jr. (the "1967-68 proceedings"). In connection with these proceedings, Respondent's existence was formally suggested to the court and the issue of any legal rights which she might have as a possible heir of Williams, Sr. with respect to Williams, Sr.'s estate and the renewal term of copyright in the Works was litigated. (App. J-1 and K-1).

Respondent was represented in the 1967-68 proceedings by a court-appointed guardian ad litem who contacted the Deuprees and advised them of the proceedings. The Deuprees told him that they were not interested in pursuing any claim on behalf of Respondent. Despite the Deuprees' request to the contrary, the guardian ad litem vigorously pursued Respondent's claims. (App. at J-1 and K-1).

After lengthy evidentiary proceedings, the Circuit Court found that (1) Respondent had no right of inheritance from Williams, Sr. under copyright law, (2) Respondent was not an heir of Williams, Sr. and (3) Williams, Jr. was the sole heir of Williams, Sr. (App. at K-1.5 and J-1.3).

In conjunction with Respondent's twenty-first birthday in January 1974, Mrs. Deupree told Respondent that Williams, Sr. was or could be her biological father and that Respondent was entitled to certain funds from the

Estate of Lillian Stone, her first adopted mother. Following these disclosures, Respondent began to seek information relative to Williams, Sr., including reading a book on his life which includes references to the 1967-68 proceedings and to an illegitimate child, allegedly fathered by Williams, Sr., who had been adopted. At that time, Respondent surmised that she might be that child. (App. at C-1.8). Despite this and other information, Respondent made no efforts to prove or otherwise investigate her paternity until years later. (App. at C-1.8).

In 1979, Respondent contacted the Alabama Department of Pensions and Security regarding her biological mother. Respondent told the Department (1) what she had been told by Mrs. Deupree of her relationship to Williams, Sr., (2) that she knew of her identity, (3) that she had read newspaper clippings about Williams, Sr. and knew that there had been mention of her in the papers at the time of the 1967-68 proceedings and, significantly, (4) that she did not want anyone ever to link her with Williams, Sr. Approximately a year later, in December, 1980, Respondent's adoptive father gave Respondent additional information relative to her alleged biological parentage. (App. at B-1.6 and C-1.9).

Petitioners have dealt with and exercised dominion over the copyrights in the Works, both original and renewal term, as the owners of all of the rights therein. Petitioners issued licenses and entered into contracts with respect to the Works; received, disclosed and utilized income from the exploitation of such copyrights and included that income on their federal income tax returns as provided by law; expended sums to exploit the copyright in the Works during the renewal term; otherwise dealt with such rights as the sole owners and beneficiaries thereof; and changed their positions in reliance upon the 1967-68 proceedings and Respondent's failure to assert any claim to an interest in the Works. (App. at C-1.11). In

May 1985, Petitioners Rose and Acuff as trustees in liquidation sold their interest in the renewal term of copyright in the Works to Petitioners Acuff-Rose-Opryland and Milene-Opryland, making substantial warranties and representations relative to their ownership of the Williams, Jr. rights in the renewal term of copyright in the Works, thereby rendering themselves potentially liable for indemnification in the event of a breach of such representations and warranties. (App. at C-1.11). All of these actions were taken in reliance on the absence of any challenge by Respondent to their rights in the Works or the assertion by her of any claim to an interest in any of the rights in the Works.

B. COURSE OF PROCEEDINGS

1. FEDERAL PROCEEDINGS

Respondent filed this action with the United States District Court for the Southern District of New York on September 12, 1985. The operative pleading in this action is the Third Amended Complaint which alleges two (2) claims for relief. (App. G-1). The first claim, alleged against all Petitioners, avers that Respondent is the natural daughter of Williams, Sr. and, as such, is the owner of not less than an undivided one-third (1/3) interest in the renewal term rights in the Works and an appropriate interest in foreign exploitation of the Works. The first claim seeks various relief with respect to Respondent's alleged status and rights arising therefrom. (App. at G-1.19-1.21).

Respondent's second claim alleges a conspiracy to defraud Respondent and a breach of fiduciary duty against the Acuff-Rose Petitioners only, seeking compensatory and exemplary damages. Petitioner Williams, Jr. and the Aberbach Petitioners were not named as parties to the second claim. (App. at G-1.21-1.22).

After exhaustive discovery, the Petitioners submitted a joint Motion for Summary Judgment based on various

grounds. For purposes of such Motion only, it was assumed *arguendo* that Respondent was the biological child of Williams, Sr.

Respondent also moved for partial summary judgment on her claim that she is Williams, Sr.'s natural daughter and thereby entitled to an undivided one-third interest in all renewal rights in the Works. Petitioners Berlin, Chappell and Aberbach moved the District Court for summary judgment and dismissal of the claims against them on separate grounds. (App. at C-1.4).

The District Court granted the Petitioners' joint Motion for Summary Judgment and dismissed the Third Amended Complaint in its entirety, based upon the doctrine of laches, holding that Respondent had unreasonably delayed in asserting her claims and that Petitioners had been materially prejudiced thereby. (App. at C-1.16-1.18). The District Court did not reach or address the other grounds asserted by the Petitioners in their joint Motion for Summary Judgment or the other summary judgment motions. (App. at C-1.4).

Respondent appealed the District Court's decision to the United States Court of Appeals for the Second Circuit. Pursuant to an Opinion dated April 21, 1989, the Second Circuit affirmed the judgment of the District Court (the "Earlier Decision"). (App. B-1).

Respondent submitted a Petition for Rehearing to the Second Circuit which was denied. (App. E-2 and E-3). Respondent subsequently filed a Motion for Recall of Mandate and Order Granting Leave to File Petition for Rehearing and Rehearing in Banc, dated July 31, 1989. (App. E-4). On August 18, 1989, Respondent filed a Petition for Writ of Certiorari before this Court with respect to the April 21, 1989 decision of the Second Circuit. (App. F-1). The Motion for Recall was granted by the Second Circuit on August 24, 1989 (App. E-5), and Respondent submitted her second Petition for Rehearing on September 7, 1989. (App. E-6).

On October 23, 1989, Respondent moved this Court to defer consideration of her Petition pending the Second Circuit's action on her second petition for rehearing. (App. F-2). While the second Petition for Rehearing was pending, this Court, on November 7, 1989, denied Respondent's Petition for a Writ of Certiorari and her motion for deferral. (App. F-3). Subsequently, on December 5, 1989, the Second Circuit granted Respondent's request for a rehearing; conducted the same without notice to, or oral argument by, Petitioners; vacated its earlier affirming decision; reversed the District Court's dismissal of Respondent's complaint and remanded this action to the District Court for further proceedings (the "Instant Decision"). (App. A-1).

2. ALABAMA STATE COURT PROCEEDINGS

Petitioners Williams, Jr., Acuff and Rose and Respondent are also parties to a related proceeding in the state courts of Alabama[2] which has resulted in the issuance of decisions by the Supreme Court of Alabama in the case of *Stone v. Gulf American Fire and Casualty Co., et al.*, Case No. 87-269, dated July 5, 1989, and "On Application for Rehearing," dated November 9, 1989 (the "Alabama Decisions"). (App. H-1 and H-2). Although the Alabama Decisions, which concern the Williams, Sr. estate, should be irrelevant to this action regarding an entitlement to an interest in renewal copyrights[3], such decisions have so

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[2] Neither the remaining Acuff-Rose Petitioners nor the Aberbach Petitioners were or are parties to such action.

[3] Renewal copyrights under both the Copyright Acts of 1909 and 1976 could never be an asset of a deceased author's estate if a widow or children survive into the renewal period, i.e. the statutory period during which a copyright could be renewed. *Frederick Music Co. v. Sickler*, 708 F.Supp. 587

(Continued on following page)

tainted the actions of the Second Circuit that analysis of its conduct will be aided by a succinct statement of the Alabama proceedings.

The Alabama Decisions arose from an action in the Alabama courts instituted (in response to Respondent's demand letter, dated August 5, 1985) by Hank Williams, Jr., Roy Acuff and Wesley Rose against Respondent regarding her alleged entitlement to share in the assets and proceeds of the estate of Williams, Sr. (App. at I-2.2). Respondent counterclaimed against Williams, Jr. for a determination of her status as a child of Williams, Sr. (App. at I-2.3) and filed a third party indemnity action against the administrators of the Williams, Sr. estate, the attorneys for the estate and the insurance company which issued the administrators' bonds. (App. at I-2.3).

Williams, Jr., Acuff and Rose moved for summary judgment on the initial action and Respondent's counterclaim. The third party defendants also moved for summary judgment on the third party indemnity action. The trial court granted all motions for summary judgment but held that, although not entitled to share in the estate, Respondent was the natural daughter of Williams, Sr. (App. at I-2.20 and I-3.3).

Respondent did not appeal the granting of summary judgment on the initial action or her counterclaim, the only actions to which any Petitioners herein were parties, and such judgments became final. Respondent elected to appeal only the granting of summary judgment on her third party indemnity action. It is the appeal from the summary judgment on that action, in which none of the Petitioners were parties, that gave rise to the Alabama Decisions.

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(S.D.N.Y. 1989). Since both Williams, Jr. and Berlin are still living, the renewal copyrights of Williams, Sr. never became an asset of the Estate of Williams, Sr. or subject to the jurisdiction of the Alabama courts.

Despite the uncontroverted fact that none of the Petitioners were a party to the third party action or privies with any party thereto, the Alabama Decisions, in a total disregard of due process, have attempted to deprive Williams, Jr. of vested property rights derived from the estate of Williams, Sr. and the 1967-68 proceedings, including, without jurisdiction to do so, deprivation of ongoing renewal term copyright royalties. (App. at H-1.55).

Due to the unconstitutional deprivation of long-vested property and property rights attempted by the Alabama Supreme Court in the Alabama Decisions, Petitioner Williams, Jr. submitted, on or about March 30, 1990, a Petition for Writ of Certiorari to this Court with respect thereto, to which the Court is respectfully referred. *See Randall Hank Williams, Petitioner v. Catherine Yvonne Stone, Respondent*, Petition for Writ of Certiorari to the Supreme Court of Alabama (the "Alabama Petition"). The Second Circuit decision and the Alabama Decisions are so inextricably related that the separate Petitions should be considered jointly by this Court.

VIII

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The United States Court of Appeals for the Second Circuit has ignored judicially accepted standards for the review of a District Court decision based upon the District Court's discretion – in this case, a finding of laches sufficient to bar Respondent's claims. The Second Circuit even ignored the authority it had previously cited in the Earlier Decision when it had affirmed the District Court's decision and found no abuse of discretion. Indeed, the Second Circuit seemingly got caught up in the emotion of the Alabama Decisions and neglected to articulate any standard of review at all – thereby implicitly adopting a standard of review which does not comport with any known precedent.

Proper respect for the discretion of district judges and careful attention to the standard of review on appeal are critical issues for the efficient and prudent administration of the federal courts. However, the Second Circuit has chosen to follow its own path. Its cavalier disregard for such discretion and standards was clearly inspired by the Alabama Decisions. It is also obvious that the Instant Decision was tainted by the "facts" found in the Alabama Decisions which were rendered with an unconstitutional disregard of due process rights, including the retroactive application of "new" law to divest Petitioner Williams, Jr. of long-vested property and property rights.

The Second Circuit turned the Earlier Decision and that of the District Court on their respective ears by finding "facts" which were not found by the District Court from the undisputed factual record. It was only by reaching outside the facts found in the federal judicial system that the Second Circuit reversed itself and the District Court. The critical "facts" relied upon by the Second Circuit in the Instant Decision were extracted from the "facts" of the Alabama Decisions and represent a tainting of the federal judicial system by the Alabama Supreme Court's unconstitutional actions and legal applications.[4] Such critical "facts" are at odds with the finding of the District Court below.[5]

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[4] Reliance on the Alabama Decisions in this action is particularly egregious. Neither the Aberbach Petitioners, nor any of their predecessors, were parties to the actions in Alabama. (App. at I-1.1). They were never given any right to appear, present evidence or make any arguments therein. They claim no interest in the Estate of Williams, Sr. In fact, Respondent has never asserted any wrongdoing against them. (App. at G-1.13).

[5] The Instant Decision was issued after this Court had denied Respondent's own Petition for Writ of Certiorari in this case with respect to the Earlier Decision and after the Second Circuit had denied Respondent's earlier petition for rehearing.

(Continued on following page)

This case presents an excellent vehicle for this court to reassert the fundamental importance of the standard of review applied by an appellate court and the procedure through which such review should be implemented. In the Instant Decision, this Court can see that checkered procedural history results in procedural chaos and unfairness when the rules for allocation of authority within the federal judiciary are ignored or disobeyed. This case, therefore, provides an excellent vehicle for this Court to provide needed guidance in this area.

A. The Second Circuit Ignored Accepted Standards of Review.

The District Court dismissed Respondent's complaint based upon a finding that Respondent was guilty of laches. (App. at C-1.16-1.19). A determination of laches is one that is made in the discretion of the trial court. In the Earlier Decision affirming the District Court's finding of laches, the Second Circuit found that "[a] ruling on the applicability of laches is overturned only when it can be said to constitute an abuse of discretion." (App. at B-1.8). In support, the Second Circuit cited this Court's decisions in *Czaplicki v. The S.S. Hoegh Silvercloud*, 351 U.S. 525, 534 (1956), and *Gardner v. Panama R.R. Co.*, 342 U.S. 29, 30 (1951), and its own decision in *Dickey v. Alcoa S.S. Co.*, 641 F.2d 81, 82 (2d Cir. 1981). (App. at B-1.8).

Totally ignoring the "abuse of discretion" standard, the Instant Decision reversed the District Court's discretionary finding of laches. Nowhere in the Instant Decision is there a finding that the District Court abused its discretion, nor is an abuse of discretion even implied. The

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(App. E-3 and F-3). Respondent's petition for writ was based upon the Alabama Decision of July 5, 1989 and included such decision as an appendix thereto. (App. at F-1.8). Nevertheless, such petition was denied by this Court.

abuse of discretion test is simply ignored by the Second Circuit.

Had the Second Circuit applied the abuse of discretion standard, no abuse could be found. The facts found by the District Court are not clearly erroneous, and the District Court record contains ample evidence upon which the District Court based its findings. *See Olivieri v. Ward*, 766 F.2d 690, 693 (2d Cir. 1985); *Premium Service Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 229 (9th Cir. 1975). The Second Circuit itself found the District Court's account of the evidence plausible in its Earlier Decision, only choosing to reverse itself and the District Court when the Alabama Supreme Court chose to view the same facts differently. *See Anderson v. Bessemer City*, 470 U.S. 564, 573-574 (1985) (" . . . if the District Court's account of the evidence is plausible in light of the record viewed in its entirety, the reviewing court may not reverse it . . . ").

The Second Circuit made certain assumptions based upon its review of the Alabama Decisions which it used as support for its suddenly new view of the District Court's findings. None of these assumptions came or could have come from the record on the appeal to the Second Circuit. They came solely from the Alabama Decisions.

By basing the Instant Decision entirely upon assumptions derived only from a state court decision, the Second Circuit clearly ignored the abuse of discretion test and created a new, albeit unarticulated, standard for reversal of a district court's discretionary decision. This new standard is clearly at odds and in conflict with the standards of other circuits, and the previous standard of the Second Circuit, where the abuse of discretion test is the rule. *See generally Morgan v. Kerrigan*, 523 F.2d 917 (1st Cir. 1975); *Dickey v. Alcoa S.S. Co.*, 641 F.2d 81 (2d Cir. 1981); *Gruca v. United States Steel Corp.*, 495 F.2d 1252 (3d Cir. 1974); *Watkins v. Northwestern Ohio Tractor Pullers Assoc.*, 630 F.2d 1155 (6th Cir. 1980); *Deitchman v. E.R. Squibb & Sons*,

Inc., 740 F.2d 556 (7th Cir. 1984); *Watson v. Miears*, 772 F.2d 433 (8th Cir. 1985); *Premium Service Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225 (9th Cir. 1975).

This Court should grant review in this matter to provide a clear statement that the prevailing view among the circuits is the proper standard of review and consistent with the need for orderly allocation of authority within the federal judiciary and the role of the district court as the determiner of facts.

B. The Abuse of Discretion Standard of Review is Appropriate.

The major role of a trial judge is the determination of facts. Duplication of the trial judge's efforts by an appellate court would result in a huge cost in diversion of judicial resources. *Anderson v. Bessemer City*, 470 U.S. 564, 574-575 (1985). This principle underlies the deference given the trial court's determination of facts under Rule 52(a) of the Federal Rules of Civil Procedure and is not limited to determinations based upon the credibility of live witnesses. *Id.* The same rationale should apply to equitable determinations such as laches where, as here, the District Court has reviewed volumes of evidentiary material and made detailed findings of fact.

The abuse of discretion test is consistent with such rationale. There is no reason to apply any other standard of review to the granting of summary judgment on the ground of laches. Summary judgment in such circumstances necessitates detailed fact-finding by the district court as a prerequisite for the exercise of its equitable discretion. A laches proceeding cannot be reasonably resolved at the District Court level without extensive fact-gathering and judicial fact-finding.[6] In such circumstances, the summary judgment label can be misleading

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[6] Presumably, issuance of summary judgment by the District Court on grounds of laches in the absence of extensive

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because there is extensive presentation of a factual record. These proceedings are more akin to single issue trials, with the summary judgment technique employed as a useful tool for delimiting the nature and character of relevant evidence presented. Although *de novo* review is often utilized in summary judgment actions to determine whether a genuine issue of material fact exists,[7] it was neither appropriate in this matter nor, as will be demonstrated herein, was it undertaken by the Second Circuit.

The Second Circuit not only did not use the abuse of discretion test, it went outside of the record to find facts and then based its interpretation of such facts, contrary to the District Court, on inferences drawn from the Alabama Decisions. "An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court 'might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court deemed innocent'." *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 858 (1982), *quoting United States v. Real Estate Boards*, 339 U.S. 485, 495 (1950). The Second Circuit did worse than that. It substituted the interpretations of the Alabama Supreme Court.

C. The Second Circuit Usurped the Role of the District Court By Finding Facts Outside of the Record.

An appellate court has no fact finding function. It cannot receive new "evidence," determine where the

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fact-gathering and fact-finding would be reversible as an abuse of discretion.

[7] *International Union, United Auto., Aerospace and Agricultural Implement Workers v. National Right to Work Legal Defense and Educ. Found., Inc.*, 251 U.S. App. D.C. 75, 781 F.2d 928, 933 (D.C. Cir. 1986).

truth lies, and base its decision on that determination. *Goland v. CIA*, 197 U.S. App. D.C. 25, 607 F.2d 339, 371 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980). Fact finding is the function of the trial court.

In formulating the Instant Decision, the Second Circuit made no reference to the record before the District Court or even to the record before it. Instead, it extracted both "facts" and "evidence" from the Alabama Decisions and proceeded to reverse itself and the District Court. As shown herein and in the Alabama Petition, to which this Court is respectfully referred, the reliance by the Second Circuit on the Alabama Decisions is most egregiously misplaced. It has relied upon a process utilized by the Supreme Court of Alabama which totally disregards substantive and procedural due process. In so doing, the Second Circuit gave no credit to the District Court which did not find any fraud on the part of Petitioners (although there urged by Respondent) because, it must be assumed, the District Court refused to apply new law retroactively to standards of behavior which were legal at the time the actions were undertaken[8]. The Second Circuit obviously accepted the legal conclusions and related

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[8] The Alabama Supreme Court, contrary to the District Court, found that the failure of the administratrix of the Estate of Williams, Sr. and her attorney (1) to notify Respondent of possible claims and (2) to advise the Alabama trial court in the 1967-68 proceedings of information relative to the issue of Respondent's paternity possessed by the Alabama Department of Pensions and Security, constituted fraud upon Respondent and the trial court. (App. at H-1.12-1.32). Since Respondent could not have been an heir of Williams, Sr. under then applicable Alabama law (App. at H-1.41-1.43), such action could only constitute fraud if subsequently enacted legislation and subsequent legal determinations were given retroactive effect.

"findings of fact" of the Supreme Court of Alabama, thereby tainting the Instant Decision beyond repair.[9]

In the Instant Decision, the Second Circuit recited a factual background which was clearly appropriated from the Alabama Decision. (*Compare* App. A-1.5-1.7 with H-1.15-1.16, H-1.21-1.23 and H-1.26). All of this evidence was before the District Court and it did not find a genuine issue of material fact which would require a trial.[10] The record before the Second Circuit disclosed that Respondent's Third Amended Complaint had raised the issues of fraud and fraudulent concealment and that such issues were, therefore, before the District Court. (App. at G-1.13-1.19). There is no question that all *relevant facts* were before the District Court. (App. G-4 and G-5). Not only did the Second Circuit find "facts" from somewhere outside the record before it, even worse, it accepted conclusions, based on such "facts," from outside its own judicial system.

In the Instant Decision the Second Circuit quoted from three letters which were *not* part of the record before it. (App. E-1). It then concluded erroneously that these letters were never disclosed to the District Court – a conclusion which could only arise because the letters were not included by Respondent in the Joint Appendix record. (App. E-1). Such letters were, in fact, part of the record before the District Court. They were included in the factual evidence submitted to the District Court by Respondent. (App. G-4 and G-5). The District Court did not consider this evidence to create any genuine issue of

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[9] Such taint is particularly damaging to the Aberbach Petitioners who were not parties to the Alabama action and have never been alleged by Respondent to have committed any wrongdoing. *See* note 4 *supra*.

[10] This issue of fraud was argued by Respondent before the District Court based upon these and many other uncontroverted facts.

material fact relevant to the defense of laches urged by Petitioners and found by the District Court to bar Respondent's claims. (App. at C-1.16-1.18).

Nevertheless, it is apparent that the Second Circuit concluded that Petitioners had intentionally withheld such evidence, and, based upon such erroneous assumption, citing *Johanna Farms, Inc. v. Citrus Bowl, Inc.*, 468 F.Supp. 866, 874 (E.D.N.Y. 1978) (an "unclean hands" case), stated:

> "To allow [Petitioners] to bar [Respondent] from claiming her rights when the availability of the laches defense was obtained by them in such an unworthy manner would not only grant [Petitioners] a windfall in this suit to which they are not entitled, but would also encourage a party to deliberately mislead a court." (App. at A-1.9).

Clearly, the District Court was not misled.

The evidence in question was even argued by Respondent in her appeal to the Second Circuit by reference to affidavits submitted by her attorney in the District Court. (App. G-4 and G-5). The Second Circuit should not have allowed itself to be misled by the Alabama Decisions. Unfortunately, it became a determiner of "facts" not even found in the record before it, notably "facts" found by the Alabama Supreme Court.

The Second Circuit went further afield when it adopted other conclusions of the Alabama Supreme Court. It accepted as correct a legal conclusion, made in one of the three letters by the attorney for the Williams, Sr. estate, that Respondent was entitled, in 1962, to an interest in the renewal copyrights of Williams, Sr. (App. at A-1.6). In 1962, such statement was absolutely wrong as a matter of law.[11] The existence of those "rights"

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[11] In 1956, this Court held in *DeSylva v. Ballentine*, 351 U.S. 570 (1956), that one's status as a "child" for purposes of entitlement to an interest in the renewal term of copyright in a work

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remains a matter of unsettled law and is precisely the question presented to the District Court in this action.

The Second Circuit also mistakenly assumed that the letters and other evidence of the behavior of persons connected with the Williams, Sr. estate in the early years were not before the Alabama trial court in 1985. (App. at A-1.9). Evidence of such activities was, in fact, before the Circuit Court of Alabama in 1985.[12] (App. I-1).

The Second Circuit strayed even further from the facts in the record below when it concluded that Petitioners "could have sought a court declaration of their rights vis-a-vis [Respondent]." (App. at A-1.9). The existence of Respondent was disclosed to the courts of Alabama in the 1967-1968 proceedings and her rights were determined therein. (App. J-1 and K-1). Petitioners Williams Jr., Acuff and Rose sought declaratory judgment as to Respondent's alleged rights in 1985 in the Circuit Court of Alabama. (App. at I-2.2).[13] Here, the Second

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would be determined by reference to whether a person was an heir under applicable state law. Although the illegitimate child in *DeSylva* was an heir under applicable California law, as the Alabama Supreme Court recognized, from her birth in 1953 until the law changed in 1982, Respondent could not have been an heir of Williams, Sr. under applicable Alabama law. (App. at H-1.42 and H-1.48).

[12] Despite such evidence, both the District Court and the Alabama trial court found in favor of Petitioners. The Alabama trial court specifically found that there was no fraud since any disclosures which might have been made would have been legally superfluous. (App. at I-2.19). The District Court must also have found them to be so since it necessarily determined that the Petitioners were entitled to judgment as a matter of law. (App. at C-1.19).

[13] It is to be noted in this connection that the District Court in 1986 had denied Petitioner's motion to stay the District Court proceedings based upon the prior existence of such

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Circuit found facts [the non-existence of affirmative action by Petitioners] which are wholly false.

All of the "evidence" referred to in the Instant Decision was before the District Court and before the lower courts in Alabama. It is only the intervention of the Alabama Decisions with all of their unconstitutional defects of law that has corrupted the orderly process of the federal judiciary.

It is astonishing that the Second Circuit permitted itself to be guided, and its decision-making corrupted, by the Alabama Decisions when faced with the appropriate and vigorous dissents to those decisions by Alabama Justice Janie C. Shores.[14] (App. at H-1.56-1.57 and H-2.14-2.16). The Second Circuit not only ignored the caveat created by such dissents but proceeded to ignore the judicial precedent of this Court and its own prior decision, thereby departing from the usual and accepted course of judicial proceedings in a manner which mandates a review by this Court.

D. Recall of Mandate and Second Petition for Rehearing.

1. Recall of Mandate and Granting of Second Rehearing Was Improper.

Respondent lost her appeal to the Second Circuit (April 21, 1989). She then petitioned for rehearing under

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declaratory judgment action in the Alabama Circuit Court. Thus, of course, the fact that Petitioners had "sought a court declaration" was known to the District Court below. (App. G-2 and G-3).

[14] It is equally alarming that the Second Circuit utilized the Alabama Decisions in this action against the Aberbach Petitioners since they had *no part* in the Alabama actions. (App. I-2). The Aberbach Petitioners do not share in any portion of the Williams Sr. estate and were not involved in the administration thereof or in the 1967-68 proceedings.

the Federal Rules of Appellate Procedure (May 4, 1989). That petition was denied (May 23, 1989). Respondent then filed a motion for the recall of the mandate and requested a second rehearing (August 1, 1989), which request was triggered by the first Alabama Decision rendered on July 5, 1989. While the motion to recall the mandate was pending, Respondent filed a Petition for a Writ of Certiorari with this Court (August 18, 1989). While the Petition for Certiorari was pending, the Second Circuit granted Respondent's motion for leave to file a second petition for rehearing and recalled the mandate which had issued on June 5, 1989. A second petition for rehearing was submitted to the Second Circuit by Respondent on September 7, 1989.

On October 23, 1989, Respondent requested that this Court defer consideration of her Petition for Certiorari pending the outcome of the second rehearing petition in the Second Circuit. On November 6, 1989, this Court rejected Respondent's request for deferral and denied her Petition. On December 5, 1989, the Second Circuit granted Respondent's second petition for rehearing and reversed its Earlier Decision.

Neither statutes nor the Federal Rules of Appellate Procedure authorize a second or successive petition for rehearing. *National Latex Prod. Co. v. Sun Rubber Co.*, 276 F.2d 167, 168 (6th Cir.), *cert. denied*, 362 U.S. 989 (1960); *see* Fed. R. App. P. 40(a). Indeed, the Federai Rules of Civil Procedure seem to contemplate a filing in the District Court if there is a reason that a matter that has become final warrants reopening. Fed. R. Civ. P. 60(b). *See Hines v. Royal Indemnity Co.*, 253 F.2d 111 (6th Cir. 1958) (Rule 60(b) applies to the District Courts, not the Courts of Appeal). The forum in which mistakes, newly discovered evidence, or fraud should be considered is the District Court, where facts can be gathered and proof presented.

The dangers of a permissive doctrine of timeless multiple requests for rehearing and a timeless authority

for an appellate court to withdraw its mandate are presented in this case. This Court declined to defer consideration of Respondent's Petition for Certiorari and ended this litigation by its denial of Certiorari. But the Second Circuit's agreement to withdraw its mandate, after it had already denied a request for rehearing and while the matter was pending in this Court, reflects the disorderliness of the process invoked below. There is no statutory or other provision for withdrawal of the mandate by a Court of Appeals after a petition for rehearing has been denied. There is no statutory or other provision for granting multiple or successive requests for rehearing. There is, however, a provision in the Federal Rules of Civil Procedure [Rule 60(b)] for reopening final judgments on grounds of fraud or mistake.

It is worthy of this Court's attention to determine whether (a) a Court of Appeals may, without regard to time deadlines, withdraw its mandate and allow successive rehearings; and, if so, (b) what constraints exist on the exercise of that power. *See, e.g., Greater Boston Television Corp. v. FCC*, 149 U.S. App. D.C. 322, 463 F.2d 268 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *Armster v. United States Dist. Court*, 806 F.2d 1347, 1356 (9th Cir. 1986) (no rehearing should be granted on the basis of a subsequent development that involved factual events or occurrences rather than the issuance of a new controlling legal opinion); *Goland v. CIA*, 197 U.S. App. D.C. 25, 607 F.2d 339, 370-71 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980) (newly discovered "facts" outside the record before it cannot be the basis for vacating an appellate opinion); *Standard Oil Co. v. United States*, 429 U.S. 17 (1976) (semble).

2. Second Petition for Rehearing was Improper.

Under Fed.R.App.P. 40(a), a petition for rehearing must state "the points of law or fact which in the opinion

of the petitioner the court has overlooked or misapprehended." To the extent that the "facts" found by the Alabama Decisions were not in the record before the Second Circuit, they could not have been *overlooked* or *misapprehended*. The Alabama Decisions occurred subsequent to the Earlier Decision. To the extent they constitute "facts," they are not properly the subject of a petition for rehearing. As noted by the Ninth Circuit, "[A] panel is simply not capable of having *overlooked* or *misapprehended* 'points of . . . fact' occurring *subsequent* to its initial decision." *Armster v. United States Dist. Court*, 806 F.2d 1347, 1356 (9th Cir. 1986) (emphasis in original). The second petition for rehearing was outside of the bounds of Fed.R.App.P. 40(a) and should not have been granted.

In granting Respondent's second petition for rehearing based upon the Alabama Decisions, which were subsequent to and outside of the record before it, the Second Circuit has exceeded the usual and accepted course of judicial proceedings and its actions should be reviewed by this Court.

E. Jurisdiction of Court of Appeals After Submission and/or Denial of Writ of Certiorari.

As indicated in the previous section, the posture of this action is a veritable jigsaw puzzle of procedural machinations worthy of a law school examination. For purposes of this analysis, the critical facts are that, on August 24, 1989, the Second Circuit granted Respondent's motion for leave to file a second petition for rehearing and recalled its mandate, which had issued on June 5, 1989. At that time, Respondent's Petition for a Writ of Certiorari was pending before this Court, having been filed on August 18, 1989. This Court subsequently (November 6, 1989) denied the Petition for Certiorari and rejected Respondent's request for deferral of consideration of the Petition for Certiorari pending further decisions by the Second Circuit. Thereafter, on December 5,

1989, the Second Circuit granted Respondent's petition for rehearing and reversed its Earlier Decision.

The precise effect of the submission of a petition for writ of certiorari on the jurisdiction of a Court of Appeals has never been decided by this Court. The issuance of a mandate terminates the jurisdiction of an appellate court, but so long as a case is *sub judice* a court of appeals should entertain a petition for rehearing based on a change in state law. *Huddleston v. Dwyer,* 322 U.S. 232 (1944). However, no petition for writ of certiorari had been filed in *Huddleston*[15] and, here, there was no change in relevant state law.

In *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56 (1982), this Court ruled that a notice of appeal filed in a Court of Appeals was void when a motion enumerated in Rule 4(a)(4) of the Federal Rules of Appellate Procedure was pending in the District Court. In *Griggs* this Court observed that two courts should not attempt to assert jurisdiction over a case simultaneously. Similarly, in *FCC v. League of Women Voters, supra,* this Court went to great lengths to note that the pending issue in the Court of Appeals was entirely ancillary to the merits of the case then before this Court. The important question of the jurisdiction of the Court of Appeals over a case once a petition for writ of certiorari has been submitted to this Court should be decided by this Court.[16]

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[15] A pending petition for writ of certiorari has been held by the Fifth Circuit not to deprive the Court of Appeals of jurisdiction to correct clerical mistakes. *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.,* 296 F.2d 215 (5th Cir.), *cert. denied,* 368 U.S. 890, *reh'g denied,* 368 U.S. 936 (1961). Substantive changes were not considered. To Petitioners' knowledge, this Court has never ruled on this important issue. *Cf. FCC v. League of Women Voters,* 468 U.S. 364, 373 n.10 (1984).

[16] It should be noted that Respondent requested that this Court defer its decision on her Petition with respect to the

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Of even greater significance is the question of the effect of a denial of a petition for writ of certiorari upon the jurisdiction of a Court of Appeals. On this issue there appears to be a conflict between the circuits.

In both the Instant Decision and *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427, 429 (2d Cir.), *cert. denied*, 400 U.S. 829 (1970), the Second Circuit assumed it had the power to decide a petition for rehearing after this Court had denied a petition for writ of certiorari. The impropriety of exercising such authority is particularly compelling in this case because the grounds for Respondent's second Petition for Rehearing were the same grounds upon which she relied in her unsuccessful petition for certiorari.

In contrast to the Second Circuit's position is that of the Sixth Circuit in *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321 (6th Cir.), *cert. denied*, 389 U.S. 975 (1967), which declared that the denial of certiorari signifies that appellate review has been exhausted. *Cf. Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336 (3d Cir. 1982) (holding that a denial of certiorari by this Court ended that litigation so that further appellate court relief was unavailable).

The actions of the Second Circuit in the Instant Decision indicate the danger of the uncertainty of this question and the need for clarification by this Court of this important jurisdictional and procedural matter.

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Earlier Decision pending the Second Circuit's action on her second Petition for Rehearing and that such request was denied by this Court. (App. F-2 and F-3).

IX. CONCLUSION

Without the taint of the Alabama Decisions the Second Circuit reviewed the record before it and found no abuse of discretion in the District Court's granting of summary judgment in favor of Petitioners. This Court denied certiorari. The Second Circuit then improperly recalled its mandate and granted Respondent a second rehearing based on the Alabama Decisions. It ignored its own standards of review and reached outside the record before it, outside of the federal system, and found "facts" and "evidence" from the subsequent Alabama Decisions and, based upon such "facts" and "evidence" and erroneous emotional assumptions derived therefrom, reversed itself and the District Court. The Second Circuit's actions are in conflict with decisions of this Court and other circuits. In so doing, the Second Circuit has engaged in conduct outside of the usual and accepted course of judicial proceedings. Petitioners respectfully request that this Court grant certiorari to review the judgment of the Second Circuit, dated December 5, 1989.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OPINION ON PETITION
FOR REHEARING

No. 732 – August Term 1988
(Argued February 1, 1989
Decided April 21, 1989)
(Petition for Rehearing Filed
September 7, 1989
Decided Dec. 5, 1989)

Docket No. 88-7860

CATHY YVONNE STONE, an Individual,

Plaintiff-Appellant,

v.

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., a Delaware Corporation, ABERBACH ENTERPRISES, LTD., a New York Corporation, ACUFF-ROSE OPRYLAND MUSIC, INC., a Tennessee Corporation, MILENE-OPRYLAND MUSIC, INC., a Tennessee Corporation, WESLEY H. ROSE AND ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc., and Milene Music, Inc., FRED ROSE MUSIC, INC., a Tennessee Corporation, and MILENE MUSIC, INC., a Tennessee Corporation,

Defendants-Appellees.

Before:

VAN GRAAFEILAND, CARDAMONE and PIERCE,
Circuit Judges

Petition for rehearing under Fed. R. App. P. 40 made by Cathy Yvonne Stone of this panel's decision in *Stone v. Williams*, 873 F.2d 620 (2d Cir.), *cert. denied*, 58 U.S.L.W. 3301 (U.S. Nov. 7, 1989) (No. 89-295), that affirmed the grant of summary judgment dismissing appellant's complaint on the grounds of laches in the United States District Court for the Southern District of New York (Keenan, J.).

Petition for rehearing granted. Prior opinion vacated and case remanded to the district court.

MILTON A. RUDIN, Beverly Hills, California (Joseph L. Golden, Rudin & Appel. Beverly Hills, California; Kenneth E. Warner, Coblence Warner Hamilton & Smith, New York, New York, of counsel), *filed a brief for Plaintiff-Appellant.*

ALAN L. SHULMAN, New York, New York (Robert J. Warner, Richard H. Frank, Jr., W. Michael Milom, Christian A. Horsnell, Silverman, Shulman & Slotnick, New York, New York, of counsel), *filed a brief for Defendants-Appellees, Hank Williams, Jr., Wesley H. Rose, Roy Acuff, Fred Rose Music, Inc. and Milene Music, Inc.*

THOMAS R. LEVY, New York, New York, *filed a brief for Defendants-Appellees, Billie Jean Williams Berlin, Chappell Music Company and Aberbach Enterprises, Ltd.*

LAWRENCE I. FOX, New York, New York, (Stephen K. Rush, Dianna Baker Shew, Berger & Steingut, of counsel), *filed a brief for Defendants-Appellees, Acuff-Rose Opryland Music, Inc. and Milene-Opryland Music Inc.*

CARDAMONE, *Circuit Judge:*

Pursuant to an order entered August 24, 1989, granting her leave to file a petition for rehearing, Cathy Yvonne Stone petitions this panel under Fed. R. App. P. 40 for a rehearing. She had appealed from a judgment of the United States District Court for the Southern District of New York (Keenan, J.) granting summary judgment to defendant in an action plaintiff brought seeking her purported share of copyright renewal rights to songs composed by Hank Williams, Sr., her natural father. Defendants are the son and common-law wife of the late singer, and several individuals and corporations that are assignees of the copyrights to Hank Williams' songs. Judge Keenan ruled that plaintiff's claim was barred by laches. We affirm the district court in an opinion dated April 21, 1989, *Stone v. Williams*, 873 F.2d 620 (2d Cir.), *cert. denied*, 58 U.S.L.W. 3301 (U.S. Nov. 7, 1989) (No. 89-295).

The petition for rehearing of the appeal is granted. The April 21st opinion and judgment of this Court are vacated, and the matter is remanded to the district court for further proceedings.

I

At the time of plaintiff's appeal before us, she also had pending an appeal to the Supreme Court of Alabama where she sought to have her father's estate opened and to obtain her proportionate share of that estate. The defendants on that appeal included Irene Smith (Hank Williams' sister and the administratrix of his estate at the time plaintiff's claim to the estate was originally decided)

and Robert Stewart (Williams' attorney). In order to achieve that ultimate relief, Ms. Stone necessarily also petitioned the Alabama Supreme Court to set aside two orders entered in 1967 and 1968 by the Montgomery Circuit Court which, though acknowledging that Hank Williams was her natural father, declared that she was not an heir to his estate.

On July 5, 1989, the Supreme Court of Alabama reversed the trial court's award of summary judgment to defendants finding that they had intentionally, willfully and fraudulently concealed plaintiff's identity, existence, claim and rights as a natural child of Hank Williams, Sr. The court determined that defendants' fraud, along with other errors of law, presented sufficient grounds to set aside the 1967 and 1968 decrees that declared that plaintiff was not an heir to Williams' estate. This fraud, the court continued, excused plaintiff's delay in asserting her claim, and it held therefore that plaintiff had asserted her rights timely. It further found substantial evidence in the record that could indicate to a factfinder that defendants fraudulently conspired to keep certain facts relating to plaintiff's existence, identity and potential claim concealed from the courts of Alabama.

A.

A brief review of some of the factual background is necessary to understand the present posture of the matter now before us. When the famous country and western singer Hank Williams died (a few days before plaintiff was born) his mother, Lillian Stone, legally adopted

plaintiff. Hank Williams's sister, Irene Smith, had promised to care for plaintiff in the event that Lillian Stone was unable to. After Lillian Stone's death, Smith reneged on her promise, saying she wanted to avoid the "publicity and gossip" associated with the baby, and that it would be in the child's best interests to be put up anonymously for adoption. But a letter written earlier by Smith to attorney Stewart in 1954 suggests that Smith may have been motivated by more selfish reasons. Pertinent parts of that letter state:

> The idea you have about making Billy [Hank Williams' reputed widow] a legal wife isn't bad at all but I fear that once you accept her as one she will try every trick in the book. I keep thinking about the time when it will be necessary to renew copyrights on Hank's songs, as his legal wife she will be the one to do that unless of course that is one of the rights she gives up. Somehow I just can't picture her giving anything up.
>
> * * *
>
> Thanks for sending the royalties check. It sure came in handy. . . . I want to thank you again for looking out for me. You know if mother adopts that child there will be a new will. Tee [Smith's husband] says that if she adopts it and then can't take care of it, he is not going to let me take it. Keep this under your hat, mabey [sic] it will never be necessary for me to have the child at all. I feel that poor child would have a lot better chance in this life if it were adopted by someone that would never know of its origin at all. . . . Oh, well I guess I sound like I just don't want mother to change her will but really that isn't it at all. . . .

Additional correspondence between attorney Stewart and legal counsel for Wesley Rose, one of the copyright assignees, reveals Stewart's early knowledge of plaintiff's claim to the copyright renewals. Relevant language in a letter from Rose's counsel to Stewart, dated February 28, 1962 stated:

> There is no way of evaluating now what a share of the renewal copyrights would be worth and no one could predict their valuation. We feel that a nominal payment might forever cut off the right of this child to the renewals. . . .

Stewart's letter in response, dated July 5, 1962, noted:

> Since the statutory right of the child comes to it through its father, and since the federal courts have held this right belongs to an illegitimate, we may be faced with a difficult problem, and certainly one we would not want to litigate. . . .

Stewart then listed several alternative ways that plaintiff's rights to the renewals might be cut off.

In 1967 Audrey Williams, Hank Williams' former wife (now deceased), petitioned for final settlement of the estate on behalf of her son Hank Williams, Jr. Attorney Stewart was called to testify by a guardian ad litem representing plaintiff. Although he produced a child support and custody agreement executed by Williams – which provided that plaintiff would be cared for by Williams – he did not divulge to the court information he had respecting other matters relating to plaintiff's claim to an interest in her father's estate.

In 1967 and 1968 the Montgomery County Circuit Court accordingly ruled that plaintiff was not an heir to

Williams' estate. Despite this ruling, when in 1969 Stewart became administrator of Williams' estate (succeeding defendant Smith), he began setting aside a share of the estate for plaintiff's benefit. At one time he wrote to Williams, Jr.'s attorney: "the last two distributions to Randall . . . were actually an encroachment on the one-half of the Estate which could conceivably be claimed by the child." When Williams' estate was closed in August 1975, the portion set aside for plaintiff was distributed along with the other estate assets.

B.

Based upon this evidence the Supreme Court of Alabama concluded there was sufficient evidence of fraud perpetrated against Cathy Stone to make disposition of her case by summary judgment on that issue inappropriate. The court also examined whether plaintiff's claim should be barred by laches, and ruled that plaintiff's delay was excusable. The Alabama Supreme Court reasoned that she was permanently removed at age three from the city of her birth to another city for the express purpose of making it highly unlikely that she would discover her father's identity; all public records that might have revealed her paternity were ordered sealed; plaintiff had no idea of her relationship to Williams until 1974, and even then when the matter was first presented to her it was presented as mere speculation; the findings of the Alabama trial court in 1967 and 1968 (declaring that plaintiff was not an heir) were tainted by intentional fraud on the part of the administratrix and attorney of Williams' estate; and finally, plaintiff made prompt demand for her share of her father's estate as soon as she

received the sealed records containing firm evidence of her paternity.

II

Although not bound by the decision of the Alabama Supreme Court – its decision involved different parties and applicable law – we believe that its finding of fraud requires a reappraisal of our decision made before that court ruled. *Cf. Bott v. Four Star Corp.*, 807 F.2d 1567, 1576 (Fed. Cir. 1986) (defendant's egregious conduct may defeat its laches defense); *Johanna Farms, Inc. v. Citrus Bowl, Inc.*, 468 F. Supp. 866, 874 (E.D.N.Y. 1978) ("one who seeks Equity's assistance must stand before the court with clean hands"). More particularly, the finding of fraud warrants a reassessment of the prejudice to defendants that may result should we permit plaintiff's claim to proceed on the merits. *See, e.g., Czaplicki v. the Hoegh Silvercloud*, 351 U.S. 525, 534 (1956); *Saratoga Vichy Spring Co. v. Lehman*, 625 F.2d 1037, 1040 (2d Cir. 1980). We recognize that the principal defendants in the action before us are Hank Williams, Jr. and Billie Jean Williams Berlin, Hank Williams, Sr.'s common-law wife, not the administratrix and attorney of Williams' estate, as in the Alabama action. However, recited evidence in the Alabama court makes clear that the present defendants were aware of plaintiff's rights to the copyright renewals long before plaintiff. Irene Smith, who was instrumental in concealing from plaintiff evidence of who her father was, acted as Hank Williams, Jr.'s guardian during the 1967-68 proceedings. Similarly, Smith, as administratrix, and Stewart, as attorney, of Hank Williams' estate, conspired to conceal from Cathy Stone her potential rights, and took pains to cut off

those rights. These actions of his guardian benefited Hank Williams, Jr. Hank Williams, Jr.'s counsel was further advised by Stewart that a portion of the estate income was being withheld for appellant. Williams, Jr. never disavowed Stewart's actions, or mentioned any of these facts in prior court proceedings in Alabama in 1985 or in the district court proceeding we earlier reviewed and to which he and plaintiff were parties.

The prejudice to defendants we identified in our prior opinion, 873 F.2d at 625, would not have existed but for the failure of the present defendants to reveal the facts of which they had knowledge. Defendants could have sought a court declaration of their rights vis-a-vis plaintiff. Instead they chose to remain silent. They should not now be allowed to claim that they are prejudiced by plaintiff's present assertion of her rights when they were aware of them all along.

Consequently, in reassessing the equitable circumstances peculiar to this case, the equities fall on plaintiff's side. The present litigation is a contest, after all, between Hank Williams' heirs over copyright renewal rights. To allow defendants to bar plaintiff from claiming her rights when the availability of the laches defense was obtained by them in such an unworthy manner would not only grant defendants a windfall in this suit to which they are not entitled, but would also encourage a party to deliberately mislead a court. Courts of equity exist to relieve a party from the defense of laches under such circumstances. *See Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946).

Consequently, the evidence of fraud, which the Alabama Supreme Court found persuasive, makes summary judgment dismissing plaintiff's claim on the grounds of laches inappropriate. The figure representing justice is blindfolded so that the scales are held even, but justice is not blind to reality. Plaintiff therefore should have her day in court and an opportunity to have a jury determine the merits of her claim.

III

Plaintiff also requests a rehearing *en banc*. She claims an *en banc* hearing is merited because the dismissal of her claim on the ground of laches contradicts copyright law established by the Supreme Court in *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960) and *Menendez v. Holt*, 128 U.S. 514 (1888), and by us in *New Era Publications International v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989). Since the dismissal of the case on laches grounds which this panel originally affirmed is now reversed, we need not decide this question.

IV

The petition for rehearing is granted. The previous opinion of this Court of April 21, 1989, *Stone v. Williams*, 873 F.2d 620 (2d Cir. 1989), is vacated, and replaced by the present opinion which now reverses the dismissal of plaintiff's complaint by the district court on the ground of laches. The matter is remanded to the district court for further proceedings on the merits.

APPENDIX B-1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 732 - August Term, 1988

(Argued February 1, 1989 Decided APR 21, 1989)

Docket No. 88-7860

CATHY YVONNE STONE, an Individual,

Plaintiff-Appellant,

v.

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., a Delaware Corporation, ABERBACH ENTERPRISES, LTD., a New York Corporation, ACUFF-ROSE OPRYLAND MUSIC, INC., a Tennessee Corporation, MILENE-OPRYLAND MUSIC, INC., a Tennessee Corporation, WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc., and Milene Music, Inc., FRED ROSE MUSIC, INC., a Tennessee Corporation, and MILENE MUSIC, INC., a Tennessee Corporation,

Defendants-Appellees.

Before:

VAN GRAAFEILAND, CARDAMONE and PIERCE
Circuit Judges

Cathy Yvonne Stone appeals the judgment of September 7, 1988 of the United States District Court for the

Southern District of New York (Keenan, J.) granting defendants' motion for summary judgment on the ground of laches, and denying her cross motion for summary judgment, and dismissing her complaint.

Affirmed.

MILTON A. RUDIN, Beverly Hills, California (Joseph L. Golden, Susan H. Green, Rudin & Appel, Beverly Hills, California; Marjorie M. Smith, Coblence Warner Hamilton & Smith, New York, New York, of counsel), *for Plaintiff-Appellant.*

ALAN L. SHULMAN, New York, New York (Robert J. Warner, Jr., Richard H. Frank, Jr., W. Michael Milom, Christian A. Horsnell, Silverman, Shulman & Slotnick, New York, New York, *Attorneys for Defendants-Appellees Hank Williams, Jr., Wesley H. Rose, Roy Acuff, Fred Rose Music, Inc., and Milene Music, Inc.*; Lawrence I. Fox, Stephen K. Rush, Katherine M. Allen, Berger & Steingut, New York, New York, *Attorneys for Defendants-Appellees Acuff-Rose Opryland Music, Inc. and Milene-Opryland Music, Inc.*; Thomas R. Levy, New York, New York, *Attorneys for Defendants-Appellees Billie Jean Williams Berlin, Chappell Music Company and Aberbach Enterprises, Ltd.*, all of counsel), *for Defendants-Appellees.*

CARDAMONE, *Circuit Judge:*

Cathy Yvonne Stone brought this action in the United States District Court for the Southern District of New York (Keenan, J.) for her purported share of copyright renewal rights to songs composed by Hank Williams, Sr.,

her natural father. The defendants in this action are Hank Williams, Jr., the son of Hank Williams and stepson of Billie Jean Williams Berlin, who was married to Hank Williams at the time of his death, and a number of music companies or individuals that have obtained an interest in the copyright proceeds of the Williams' songs including: Aberbach Enterprises; Chappell Music Company; Acuff-Rose Opryland, Inc.; Milene-Opryland Music, Inc.; Fred Rose Music, Inc.; Milene Music, Inc.; Roy Acuff; and Wesley H. Rose. The sole issue presented is whether the district court abused its discretion when it granted defendants' motion for summary judgment and dismissed appellant's complaint on the grounds of laches. Even granting to Ms. Stone's situation the fullest stretch of sympathy, her own delay and procrastination in the end bars her suit. The district court's judgment, therefore, is affirmed.

I FACTUAL BACKGROUND

The dispute arises over copyright renewal proceeds for 60 published and copyrighted songs written or performed by country and western singer Hank Williams (Williams, Sr.) who died intestate on January 1, 1953 at the age of 29. During his lifetime the well-known singer and composer wrote such popular hits as "Your Cheatin' Heart" and "Hey Good Lookin' ". We set forth the facts briefly in chronological order.

Appellant Stone was born on January 6, 1953 in Alabama, five days after Williams, Sr. died. While Ms. Stone's biological mother, Bobbie Jett, was pregnant with her in October of 1952, she and Williams, Sr. executed an

agreement under which he acknowledged that he might be the father of appellant, but specifically did not admit paternity. The agreement further provided that Williams, Sr. pay Bobbie Jett for Ms. Stone's support, and placed the infant's custody until age 2 in Lillian Williams Stone, mother of Williams, Sr., who was present at the drafting and the execution of the agreement together with the two principals. Pursuant to its terms, Lillian Stone adopted plaintiff, and Bobbie Jett left for California. Until her death in 1955 Mrs. Stone cared for appellant. At that point, Williams, Sr.'s sister, Irene Smith, reneged on her promise to care for Cathy Stone if anything happened to Lillian Stone. As a result, appellant became a ward of the State of Alabama, and at age three in 1956 a foster child of the Deupree family. The Deuprees adopted her in 1959.

Williams, Sr. had a son, Hank Williams, Jr. The assignment of Hank Williams, Jr.'s copyright interests in his father's music generated litigation in 1967 and 1968 in the Circuit Court of Montgomery County, Alabama. That court appointed a guardian *ad litem*, attorney Drayton Hamilton, to ascertain any unknown potential heirs to the Williams estate and to represent their interests. After investigating, Hamilton concluded that the only such person was appellant Stone. Unbeknownst to Ms. Stone, her adoptive family, the Deuprees, had asked Hamilton to leave her out of the 1967 proceedings, because they thought it unlikely that she would win and were worried that their then 14-year-old daughter would be subjected to embarrassing publicity because of her status as the illegitimate child of a famous country western singer. Nonetheless, Hamilton zealously litigated Ms. Stone's interests, but to no avail. The Alabama court determined

that Hank Williams, Jr. was the sole heir of his father, and further held that appellant, as a natural child who had been adopted by another family, had no rights in any proceeds from the Williams, Sr.'s songs or their renewal rights. In reaching this conclusion, it relied on *De Sylva v. Ballentine*, 351 U.S. 570 (1956) (holding that courts must look to state law to determine child's legal status for inheritance before evaluating the child's renewal rights under the Copyright Act).

After the disruptive first few years of her life, Ms. Stone appears to have enjoyed an ordinary childhood, and developed a closely bonded relationship with the Deuprees, with no knowledge of her natural parents. Then, in late 1973, shortly before appellant's 21st birthday, Mrs. Deupree told her of the rumors regarding the identity of her natural father, but added that everything had been decided against her. This disclosure was necessary because, upon turning age 21, Ms. Stone was entitled to a small inheritance from Williams, Sr.'s mother, Lillian Stone. The Deuprees were concerned that appellant might encounter reporters while claiming the inheritance and wanted to arm her with knowledge. After picking up the inheritance check (about $3,800) at the Mobile County Courthouse, Ms. Stone went to a library and read a biography on Williams, Sr., entitled *Sing a Sad Song*, written by Roger Williams. This book mentioned the possibility that Williams, Sr. had fathered an illegitimate daughter, and the author speculated on the child's entitlement to a renewal interest in his songs. Ms. Stone surmised that she might be that daughter.

In the following years, appellant asked the Deuprees about her background and talked to some attorney acquaintances, but did little else to ascertain her connection to Williams. She recalls that the Deuprees told her that there was nothing more to do. In 1979, she met with personnel from the state agency responsible for adoptions – the Alabama Department of Pensions and Securities – but states that she no longer remembers the substance of the conversation. The record, including appellant's deposition, suggests that her feelings about Williams' parentage were ambivalent.

Her attitude crystallized in 1980 when she received a telephone call from her adoptive father, George Deupree. Evidently alluding to his decision not to pursue Ms. Stone's rights in the 1967-68 lawsuits, Deupree told her that he had undergone a change of heart after seeing Hank Williams, Jr. on a television show. Deupree has since died, but appellant related the conversation in her deposition: "I want to ask you if you would like to find out if Hank Williams is your father. He said think about it. And he said I will help you in any way that I can. And he said I think I was wrong in withholding information from you and not discussing it. And I will do everything I can to help you."

Following this call, Ms. Stone stepped up her efforts to learn about her relationship to Williams, Sr. she looked up newspaper articles about him, and sought out his relatives and those of her natural mother, Bobbie Jett, who had also since died. She met with attorney Hamilton, her former guardian *ad litem*, and discussed with him the 1952 custody and support agreement between Bobbie Jett and Williams, Sr., and obtained the records from the 1967

and 1968 Circuit Court proceedings. But Ms. Stone did not examine those documents until after she met attorney Keith Adkinson (who later became her husband) in 1984.

Appellant filed the original declaratory judgment complaint in this action on September 12, 1985 which, as amended to include all of the above-named defendants, contains two claims. The first claim against all the defendants arises under the Copyright Acts of 1909 and 1976 and seeks a number of declarations, including that Ms. Stone is the natural daughter of Williams, Sr., and as such is entitled to a proportionate share of the renewal rights from his songs. The second claim alleges that certain of the defendants committed a conspiracy to defraud her.

In addition to this federal action, Hank Williams, Jr. and Ms. Stone sued each other in Alabama state court in 1985, each seeking a declaratory judgment on appellant's status vis-a-vis Hank Williams, Sr. That court held that even though Ms. Stone was the natural child of Williams, Sr., she was not his heir under Alabama law. Thus, it gave preclusive effect to the prior 1967 and 1968 Alabama Circuit Court state ruling.

Appellant and defendants moved for summary judgment in the instant action on a number of grounds including statute of limitations and res judicata. The district court, in granting defendants' motion for summary judgment and dismissing her complaint, relied on the doctrine of laches and did not reach the other issues.

II DISCUSSION

Historically laches developed as an equitable defense based on the latin maxim *vigilantibus non dormientibus*

aequitas subvenit (equity aids the vigilant, not those who sleep on their rights). *See Independent Bankers Ass'n of America v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980) (per curiam). In contrast to a statute of limitations that provides a time bar within which suit must be instituted, laches asks whether the plaintiff in asserting her rights was guilty of unreasonable delay that prejudiced the defendants. *See, e.g., Gardner v. Panama Railroad Co.*, 342 U.S. 29, 31 (1951); *Lottie Joplin Thomas Trust v. Crown Publishers, Inc.*, 592 F.2d 651, 655 (2d Cir. 1978). The answers to these questions are to be drawn from the equitable circumstances peculiar to each case.

A ruling on the applicability of laches is overturned only when it can be said to constitute an abuse of discretion. *See Czaplicki v. The S.S. Hoegh Silvercloud*, 351 U.S. 525, 534 (1956); *Gardner v. Panama Railroad Co.*, 342 U.S. 29, 30 (1951); *Dickey v. Alcoa S.S. Co.*, 641 F.2d 81, 82 (2d Cir. 1981) (per curiam). Because this is an appeal from a motion for summary judgment that dismissed appellant's complaint, we construe the record in the light most favorable to appellant. We therefore presume the correctness of the 1985 holding of the State Court of Alabama that Cathy Stone is the natural daughter of Hank Williams, Sr. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam) (inferences must be drawn in favor of nonmoving party).

We must analyze the reasonableness of delay and the resulting prejudice, *see, e.g., Czaplicki*, 351 U.S. at 533; *Saratoga Vichy Spring Co. v. Lehman*, 625 F.2d 1037, 1040 (2d Cir. 1980), to see whether there was a material issue of fact that should have been submitted to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

A. Delay

Although laches promotes many of the same goals as a statute of limitations, the doctrine is more flexible and requires an assessment of the facts of each case – it is the reasonableness of the delay rather than the number of years that elapse which is the focus of inquiry. *See Gardner*, 342 U.S. at 31-32 (the matter should not be determined by reference to mechanical application of statute of limitations; equities of parties must be considered); *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946); *Wagg v. Herbert*, 215 U.S. 546, 553 (1910). In holding that Ms. Stone unreasonably delayed in bringing this action to have her rights declared, the district court focused on the years 1974-85, beginning with Mrs. Deupree's conversation with appellant regarding the inheritance, and ending with the filing of the complaint that initiated the instant case.

In our view, the delay for the period from 1974 to 1980 may well have been entirely excusable under the circumstances. First, her relationship with the Deuprees is by all indications the paradigm of a successful adoption. Thus, it is not surprising that loyalty and gratitude to Mr. and Mrs. Deupree, whom she considered her real parents, gave her pause at doing anything that might hurt their feelings. For this reason, George Deupree's telephone call to Ms. Stone is significant. Only after he called in 1980 could appellant be sure that investigating her natural parentage would not damage the only family bonds she knew. Second, Ms. Stone's embarrassment at asserting her relationship to Williams, Sr. is also understandable, because his notoriety would have made publicity almost impossible for her to avoid. This is

substantiated by the extensive press coverage of the 1967 and 1968 court proceedings.

Third, only in recent years have courts and the general public come to recognize that children born of unmarried parents should not be penalized by being accorded a status for which they are not to blame. In the 1967 and 1968 proceedings, attorney Hamilton argued on Ms. Stone's behalf that discriminating against illegitimate children violated the Federal Constitution. Unfortunately for appellant, Hamilton was before his time; the case that would remove much of the stigma associated with illegitimacy was then pending before the Supreme Court, but not decided until after appellant's rights had been adjudicated. *See Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding unconstitutional state statute that discriminated against illegitimates to discourage births out of wedlock).

But even though Ms. Stone might arguably be excused for the reasons just stated from filing suit until 1980, there is simply no plausible explanation for her delay in filing the instant complaint until September 1985, after five more years had passed. Appellant's filial loyalty is admirable, and one can sympathize with her feelings of embarrassment and trepidation attendant upon widespread personal publicity. But these reasons for delay cannot last forever for purposes of laches. A point arrives when a plaintiff must either assert her rights or lose them. Here Ms. Stone's procrastination and delay, which silently allowed time to slip away, remain as the only reason for her failure [sic] bring suit earlier.

Where plaintiff has not slept on her rights, but has been prevented from asserting them based, for example,

on justified ignorance of the facts constituting a cause of action, personal disability, or because of ongoing settlement negotiations, the delay is reasonable and the equitable defense of laches will not bar an action. *See* Note, *Laches in Federal Substantive Law: Relation to Statutes of Limitation*, 56 B. U. L. Rev. 940, 972 (1976). There is no such reasonable excuse, or any issue of fact presented in the instant case that would permit a jury to excuse appellant's delay for the five years beginning in 1980 and ending in September 1985.

B. Prejudice

Laches is not imposed as a bar to suit simply because a plaintiff's delay is found unexcused; it must also be determined whether the defendants have been prejudiced as a result of that delay. *See Saratoga Vichy Spring Co.*, 625 F.2d at 1040. Although an evaluation of prejudice is another subject of focus in laches analysis, it is integrally related to the inquiry regarding delay. Where there is no excuse for delay, as here, defendants need show little prejudice; a weak excuse for delay may, on the other hand, suffice to defeat a laches defense if no prejudice has been shown. *See Larios v. Victory Carriers, Inc.*, 316 F.2d 63, 67 (2d Cir. 1963). Defendants may be prejudiced in several different ways. *See Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 844 (D.C. Cir. 1982). One form of prejudice is the decreased ability of the defendants to vindicate themselves that results from the death of witnesses or on account of fading memories or stale evidence. Another type of prejudice operates on the principle that it would be inequitable in light of some change in defendant's position to permit plaintiff's claim

to be enforced *See Holmberg*, 327 U.S. at 396. Defendants here were prejudiced in both ways.

As the district court noted, some of the key people having knowledge of the events preceding Ms. Stone's birth have died since 1974 – George Deupree, Bobbie Jett and Billie Jean Williams Berlin [sic]. All of their deaths are not equally prejudicial. For example, Bobbie Jett died in 1974, so absence of her testimony cannot be found to prejudice defendants because she would not have been alive to testify even if appellant had filed suit immediately. Nevertheless, the circumstances giving rise to this appeal have already spanned over two decades and the additional five years of Ms. Stone's unexcused delay doubtless would hamper the defense further – appellant's deposition reveals that even her memory has faded significantly in the interim. *See Dickey v. Alcoa S.S. Co.*, 641 F.2d 81, 83 (2d Cir. 1981). We conclude that the defendants were prejudiced to some degree by evidence that was lost by death or weakened during the delay. Because the defendants were injured in other ways by the delay, we need not hold that a finding of this kind of prejudice is alone sufficient to support the laches defense.

Prejudice may also be found if, during the period of delay, the circumstances or relationships between the parties have changed so that it would be unfair to let the suit go forward. The defendants have entered into numerous transactions involving Williams, Sr.'s songs. Ms. Stone responds that these transactions need not be unravelled – she could simply share in the profits. But that argument ignores the fact that the transactions were premised on the apparent certainty of the ownership of the songs' renewal rights – attributable to appellant's delay. This

procrastination prejudiced defendants by lulling them into a false sense of security that the renewal rights were as they appeared and that she would not contest the 1967 and 1968 court ruling. *See Independent Bankers Ass'n of America v. Heimann*, 627 F.2d at 488 (D.C.Cir. 1980); *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 704 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971).

We cannot be sure that defendants' [sic] would have struck the bargains they did had they anticipated the diminution in their profits that Ms. Stone seeks. This result is logically not altered by whether the defendants made actual expenditures or whether they simply incurred the opportunity costs implicated in foregoing other ventures. As Judge Learned Hand wrote as a district court judge in a copyright case in which the plaintiff delayed for 16 years before filing suit, it would be unfair for a plaintiff "to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his speculation has proved a success. Delay under such circumstances allows the owner to speculate without risk with the other's money; he cannot possibly lose, and he may win." *Haas v. Leo Feist, Inc.*, 234 F. 105, 108 (S.D.N.Y. 1916); *see also Independent Bankers*, 627 F.2d at 488. We therefore agree with the district court that the change in relationships and circumstances that occurred while Ms. Stone delayed would prejudice the defendants if the case were allowed to proceed at this late date.

Finally, we note that the underlying value of the laches doctrine, as with statutes of limitations, is that of repose. Even assuming that appellant's claims are meritorious, the availability of the laches defense represents a

conclusion that the societal interest in a correct decision can be outweighed by the disruption its tardy filing would cause. Thus, courts, parties and witnesses "ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights." *See Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 428 (1965).

III CONCLUSION

We hold therefore that Ms. Stone's delay in filing suit until September 1985 was unexcused and has prejudiced defendants. Accordingly, the order of the district court is affirmed.

APPENDIX C-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

CATHY YVONNE STONE,

Plaintiff,

-against-

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a division of CHAPPELL & CO., INC., ABERBACH ENTERPRISES, LTD., ACUFF-ROSE OPRYLAND MUSIC, INC., MILENE-OPRYLAND MUSIC, INC., WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music Inc., FRED ROSE MUSIC, INC., and MILENE MUSIC, INC.,

Defendants.

85 Civ. 7133 (JFK)

OPINION and ORDER

- X

APPEARANCES:

For Plaintiff:
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Of Counsel: Marjorie Smith, Esq.
Coblence & Warner
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F. Keith Adkinson, Esq.
Washington, D.C.

For Defendants Hank Williams, Jr.,
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Milene Music, Inc.:
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Silverman, Shulman & Slotnick, P.C.
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and Milene-Opryland Music, Inc.:
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New York, NY

For Defendants Billie Jean Williams Berlin, Chappell
Music Company and Aberbach Enterprises, Ltd.:
Thomas R. Levy, Esq.
New York, NY

JOHN F. KEENAN, United States District Judge

JOHN F. KEENAN, United States District Judge:

Background

Plaintiff, born on January 6, 1953, brings this action concerning her allegation that she is the illegitimate daughter of the late country and western singer Hank Williams, Sr. ("Hank") and is entitled to a share of the royalties derived from Hank's compositions ("the Works").

Plaintiff has sued ten defendants: Hank Williams, Jr., the legitimate son of Hank and Audrey Mae Williams; Billie Jean Williams Berlin, who was married to Hank

when he died on January 1, 1953; Aberbach Enterprises, Ltd., the owner of the copyright renewal rights in the Works that previously had been held by Berlin and were transferred to Aberbach pursuant to a May 28, 1969 agreement; Chappell Music Company, an entity that acts as an administrative agent for Aberbach in connection with the Berlin renewal interest; Acuff-Rose Opryland Music, Inc. ("ARO"), the successor in interest of both the original rights and the renewal rights in the Works held by Williams, Jr.; Milene-Opryland Music, Inc. ("MOM"), an additional successor in interest in the original rights and the renewal rights in the Works held by Williams, Jr.; Fred Rose Music, Inc. ("FRMI"), a corporation that, in 1963, obtained the renewal rights held by Williams, Jr. and was liquidated on May 29, 1985; Milene Music, Inc., a corporation that, in 1963, also obtained the renewal rights held by Williams, Jr. and was liquidated on May 29, 1985; and Roy Acuff and Wesley H. Rose, Trustees in Liquidation for FRMI and Milene Music.

The Third Amended Complaint alleges two causes of action. First, the complaint avers that plaintiff is Hank's illegitimate daughter, and as such is a "child" entitled to one-third of the rights, and interests in and derived from, the Works pursuant to the United States Copyright Act of 1976. Second, plaintiff contends that defendants ARO, MOM, Rose, Acuff, FRMI and Milene and certain non-parties engaged in a conspiracy that lasted over fifteen years. The goal of this alleged scheme was to prevent plaintiff from perfecting her copyright interest in the Works so that the defendants would have the sole financial benefit of the copyrights. The defendants purportedly achieved this goal by withholding from plaintiff and the

Alabama state courts information about her identity and by arranging for the appointment of Drayton Hamilton as guardian ad litem for plaintiff during legal proceedings held in 1967-1968. In addition, the scheme allegedly included a 1963 agreement made by Williams, Jr., through his guardian, with FRMI and Milene providing for Williams, Jr. to transfer his rights in the Works.

Currently pending before the Court are three motions. The defendants have jointly moved for summary judgment asserting, *inter alia*, that the claims are barred by the copyright statute of limitations, laches, equitable estoppel, res judicata, collateral estoppel, and the terms of the 1976 Copyright Act. Plaintiff has cross-moved for partial summary judgment on her claim that she is Hank's natural daughter and that she is entitled to an undivided one-third interest in all renewal rights in the Works. Defendant Berlin, Chappell Music and Aberbach Enterprises have moved for partial summary judgment on the ground that if plaintiff were to prevail on her first cause of action, Berlin is entitled to a one-half interest in the Works and Hank's children are entitled jointly to a one-half interest.

For the reasons set forth below, the Court grants the defendants' motion for summary judgment and the complaint is dismissed in its entirety. The Court, therefore, does not reach the questions raised in either plaintiff's partial summary judgment motion or in the partial summary judgment motion made by defendants Berlin, Chappell Music and Aberbach Enterprises.

Facts

For the purposes of defendants' summary judgment motion, the Court assumes that Hank is plaintiff's natural father. Her natural mother is Bobbie Jett. Plaintiff was conceived in approximately April, 1952. Although Hank allegedly wanted to raise the child, his desires did not extend to marrying the child's mother, Bobbie Jett. This intention was made unmistakably clear on October 18, 1952, when Hank married defendant Berlin. However, Hank entered a contract with Jett three days prior to marrying Berlin. The agreement addressed custody issues and called for him to bear various financial responsibilities in connection with the birth of Jett's child. The contract also stated that paternity was in doubt and not admitted by the agreement. On January 1, 1953, Hank Williams, Sr. died at 29 years of age. Less than one week later, on January 6, 1953, Bobbie Jett gave birth to plaintiff.

After Jett left the hospital, the baby was left in the care of Lillian Stone and Marie Harvell, Hank's mother and cousin respectively. On December 23, 1954, a final decree of adoption was entered by the Montgomery County, Alabama, Department of Public Welfare giving Mrs. Stone the child. Irene Smith, Hank's sister, promised to care for the child in the event something happened to Mrs. Stone. Sadly, Mrs. Stone died on February 26, 1955 and Smith broke her pledge. Plaintiff was made a ward of the State of Alabama on April 29, 1955 and remained a ward of the state until February 21, 1956. On that date, an interlocutory order of adoption was entered giving custody to the Deupree family. On April 23, 1959, a final decree of adoption was entered.

While plaintiff was being raised by the Deuprees and living her early life, events concerning Hank's estate and other collateral issues continued to unfold. Plaintiff was awarded $2,000 as her homestead interest in Mrs. Stone's residence after Mrs. Stone died. This money was placed in an interest-bearing account with the Circuit Court of Montgomery County, Alabama, to be held for plaintiff until she turned twenty-one years old on January 6, 1974. As will be described below, plaintiff only became aware of this bequest in approximately December, 1973. In 1963, the guardian of Wiiliams [sic], Jr. petitioned the Circuit Court of Montgomery County, Alabama, for permission to sell Williams, Jr.'s rights in the renewal term copyrights in the Works to FRMI. The court granted the request and an agreement was entered on March 20, 1963.

This agreement resulted in litigation taking place during 1967 and 1968 in the Circuit Court. The action attempted to determine all rights in the Works and involved Williams, Jr.'s petition to vacate the 1963 agreement. Thus, an inquiry was made into the existence of any unknown heirs to the estate. Drayton N. Hamilton, a Montgomery attorney who had previously been appointed as plaintiff's guardian ad litem in connection with Lillian Stone's estate, was named guardian ad litem by the Circuit Court to represent any minors who might have an interest in Hank's estate. After conducting an investigation, Hamilton told the court that plaintiff was the only potential additional heir. Hamilton contacted the Deuprees through the Alabama Department of Pensions and Security ("Alabama P & S") and advised them of the 1967-1968 proceedings. Mr. and Mrs. Deupree came to

Montgomery and apparently had a meeting with Hamilton. Hamilton was told not to pursue any claim on behalf of plaintiff. Despite this request, Hamilton continued to press vigorously the rights of plaintiff as Hank's natural daughter. During his activities, Hamilton obtained a copy of the 1952 contract between Hank and Jett which was introduced as evidence in the Circuit Court. After conducting evidentiary hearings which were widely reported in the Alabama press, the Circuit Court ruled that plaintiff was not an heir entitled to any inheritance from Hank's estate. Hamilton then unsuccessfully sought leave to appeal the court's rulings, despite the wishes of the Deuprees.

The matter remained closed until approximately the end of 1973. By this time, plaintiff was a college student at the University of Alabama. The Deuprees went to Tuscaloosa to visit plaintiff at college during either the end of December, 1973 or the early part of January 1974. Since plaintiff was on the verge of turning twenty-one years old, the issue of Lillian Stone's estate needed to be addressed. At one point during the visit of her adoptive parents, plaintiff went to the Deuprees' hotel room. Although the accounts of plaintiff and Mrs. Deupree differ slightly, the following is undisputed. Mrs. Deupree told plaintiff that Hank Williams, Sr. either was, or could be, her biological father, and that after her twenty-first birthday plaintiff had to go to the Montgomery courthouse to pick up an inheritance from the estate of Lillian Stone. Soon thereafter, plaintiff went to Montgomery and was accompanied by an uncle, Stanley Fountain, who was a United States Marshal. Her conversation with Mrs. Deupree and her trip to Montgomery prompted plaintiff to

visit a library in Tuscaloosa to research Hank's life. Plaintiff read a book by Roger Williams entitled *Sing a Sad Song* which chronicled Hank's life. The book contained a passage concerning a child born to a brunette from Tennessee. The child, according to the book, was cared for by Lillian Stone until the child was adopted. After her discussion with Mrs. Deupree and the receipt of a $3,800 inheritance from the Stone estate, plaintiff thought that this child might have been herself when she read the book in early 1974. Plaintiff, who claims Mrs. Deupree told her that there was no proof showing Hank to be her natural father and that everything had already been decided against plaintiff, then chose not to pursue the matter further.

Another significant event occurred during 1976. Plaintiff told Nicholas Braswell, a Montgomery attorney who was married to one of plaintiff's college sorority sisters, that she was adopted and might be the biological daughter of Hank Williams, Sr. Braswell was familiar with Judge Richard Emmett [sic] who had presided over the 1967-1968 Circuit Court proceedings. Braswell told plaintiff that Judge Emmett [sic] had a tremendous interest in Hank and had memorabilia from Hank's career all over his office. Braswell asked plaintiff if she objected to his calling up Judge Emmett [sic] and passing along her claim; plaintiff told Braswell to call Judge Emmett [sic]. After Braswell spoke with the judge, he again spoke with plaintiff, telling her that Judge Emmett [sic] would like to meet her. Plaintiff, however, never tried to contact the judge while he was in Montgomery. At some point, Judge

Emmett [sic] moved from Montgomery, Alabama, to California. Although plaintiff learned about this relocation in the newspapers, she never attempted to find out where in California Judge Emmett [sic] moved to, and never attempted to contact him.

In December, 1980, plaintiff received a telephone call from Mr. Deupree. During the conversation, Deupree told plaintiff that he had made certain decisions in the 1960's which he had come to regret. Presumably, these decisions concerned the 1967-1968 proceedings in the Circuit Court. Deupree stated that if plaintiff wanted to discover whether Hank was her biological father, he would help in any way possible. Deupree evidently had this change of heart after watching Williams, Jr. give an interview on a television program. Deupree told plaintiff that he would send her some newspaper articles and the names of certain individuals with whom he had been in contact during the 1960's.

At this point, plaintiff attempted to discover what her file with the Alabama P & S contained. Although plaintiff could not obtain access to her file, she does not recall the reasons given by the Alabama P & S. She then told the Alabama P & S that she wanted to contact her natural mother. As a result, the department wrote a letter to Willard Jett, Bobbie Jett's uncle. During 1981, plaintiff once again read books and newspaper articles on Hank. Yet, it was in 1981 that she read an article that referred to Hank's cousin, Marie Harvell. She had previously spoken with Charles Carr, Hank's chauffeur, a name she uncovered by reading a book. Carr told plaintiff about the existence of Harvell. During 1981, plaintiff visited Harvell. Upon seeing a birth mark on plaintiff's arm, Harvell

began to cry, evidently believing that plaintiff was Hank's daughter. Plaintiff made subsequent visits to the Harvell home and discussed Hank, Bobbie and their relationship. Harvell also gave plaintiff Willard Jett's name. Plaintiff telephoned Willard, who resided in Nashville, and was told that Bobbie had died. Plaintiff had additional telephone conversations with Willard and had meetings with his wife. Later in 1981, plaintiff travelled to Nashville and met other members of the Jett family. In addition, plaintiff went to see the Cooks, a family that cared for plaintiff after the death of Mrs. Stone and prior to her adoption by the Deuprees. In October, 1981, plaintiff travelled to California to gather more information about Bobbie Jett; plaintiff made no attempt to locate Judge Emmett [sic] during this trip.

Plaintiff's investigation also brought her to Drayton Hamilton and another lawyer, Joseph Matranga. Plaintiff went with Hamilton to the Montgomery courthouse to examine records pertaining to the 1967-1968 proceeding. Mr. Deupree retained Matranga to assist with the investigation and Matranga recommended to plaintiff that she solicit Hamilton's assistance in locating pertinent documents. Hamilton stated that he would send material to Matranga. Despite being in contact with Hamilton and seeing a large box of documents in 1981, it was not until 1984 that plaintiff asked Matranga for the documents he had received from Hamilton. In September, 1984, plaintiff met F. Keith Adkinson, an attorney who she subsequently married. On September 12, 1985, plaintiff brought this lawsuit.

Over the past twenty years, other events touching on this case have also transpired. Since January 1, 1974,

Bobbie Jett, Audrey Mae Williams and George Deupree have all died. In addition, Robert Stewart, who drafted the 1952 contract between Hank and Bobbie, and represented Hank and members of his family and the estate, died in the intervening years. Various financial transactions have been completed during the past twenty years. FRMI and Milene paid royalties from the Works to Hank's estate, Williams, Jr. and Audrey Mae Williams. Pursuant to the 1963 agreement, FRMI, Milene, ARO and MOM have all paid royalties to Williams, Jr. based on the Works' renewal term rights. Consequently, Williams, Jr. has reported these royalties on his personal income taxes over the years. After the payment of royalties for the period ending June 30, 1985, ARO and MOM have withheld from Williams, Jr. payments of royalties arising out of the renewal term rights pursuant to an assignment. ARO and MOM, as well as FRMI and Milene, reported on their tax returns those royalty sums not paid to Williams, Jr., Audrey Mae Williams or the estate. In addition, these entities executed licenses and contracts for the exploitation of the Works. When FRMI and Milene were liquidated, the Trustees sold the copyrights that the companies held, warranted their good title and pledged to indemnify the purchaser for any breach of the warranties. Berlin, Chappell and Aberbach have also received royalties based on Berlin's interest in the renewal term rights. Each has reported these royalties on their respective income taxes.

DISCUSSION

The parties in this hotly contested action have thoroughly briefed several areas including the 1976

Copyright Act, the statute of limitations, res judicata and collateral estoppel. However, this entire controversy turns on a basic and time honored principle: "Equity aids the vigilant, not those who slumber on their rights." *Standard Oil Co. of New Mexico v. Standard Oil Co. of California*, 56 F.2d 973, 975 (10th Cir. 1932).

The doctrine of laches serves as a complete bar to a plaintiff's claims if the defendants demonstrate an unreasonable and inexcusable delay by plaintiff in bringing the lawsuit and that the delay resulted in undue prejudice suffered by the defendants. *Dalsis v. Hills*, 424 F. Supp. 784, 788 (W.D.N.Y. 1976). Laches requires a balancing of the equities between the parties. *Potash Co. v. International Minerals & Chemical Corp.*, 213 F.2d 153, 156 (10th Cir. 1954). Therefore, the longer a plaintiff unjustifiably delays in asserting a claim, the lesser the showing of prejudice that will be required of the defendant. *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 843 (D.C. Cir. 1982). The laches calender clearly does not turn its pages when an individual is justifiably ignorant of the facts giving rise to a claim. *Potash Co.*, 213 F.2d at 155. However, a plaintiff cannot look away from facts that could support a claim, and then later – in this case, many years later – begin to act on those facts and obtain judicial relief. Thus, the clock begins to tick when plaintiff has either actual or constructive notice of facts supporting a cause of action. *Knox v. Milwaukee County Board of Elections Commissioners*, 581 F. Supp. 399, 402 (E.D. Wis. 1984); *Anaconda Co. v. Metric Tool & Die Co.*, 485 F. Supp. 410, 427 (E.D. Pa. 1980). As the Supreme Court noted nearly a century ago,

> [t]he defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts.

Foster v. Mansfield, Coldwater and Lake Michigan Railroad Co., 146 U.S. 88, 99 (1892).

An analysis of plaintiff's conduct demonstrates that she ignored facts as early as 1974 that alerted her to the strong possibility that Hank Williams, Sr. was her biological father. Indeed, a cynic might suggest that plaintiff slumbered peacefully, and knowingly, on her rights until she was awakened by the attractive sound of a ringing cash register.

As plaintiff reached twenty-one years of age in January, 1974, she was told, at a minimum, that she could be the biological daughter of one of the most successful country and western singers of all time, Hank Williams, Sr. Soon thereafter, she went to the courthouse in Montgomery to pick up an inheritance of over $3,000 from the estate of a woman who plaintiff could have readily discovered to be Hank's mother. Plaintiff testified that this amount was a significant figure to her when she went to the courthouse at age twenty-one. Despite the fact that she was an adult at the time, plaintiff was accompanied to court by her uncle, a federal marshal, because of the Deuprees' concern that news reporters would be present.

At this point, a reasonable person would clearly be on notice that Hank was suspected to be plaintiff's biological father. In fact, plaintiff herself entertained this thought. After receiving her inheritance, she went to a library and read a biography of Hank, *Sing a Sad Song*, written by Roger Williams. Plaintiff believed that she might have been the subject of a passage describing Hank's illegitimate daughter born in 1953. However, she did nothing to pursue the issue other than to ask the Deuprees certain questions, the subject matter of which she does not remember. Plaintiff, an adult, accepted the statements of the Deuprees that there was no proof of Hank's parentage and that "it had all been decided." Moreover, in 1976 plaintiff learned that Judge Richard Emmett [sic] was a long time Hank Williams buff. Plaintiff permitted the judge to be told of her claim that she might be Hank's illegitimate daughter, but opted not to see him after learning of the judge's desire for a meeting. Indeed, once the judge moved to California, she did not attempt to locate him.

The fact that plaintiff made a calculated decision not to pursue her biological link to Hank during the 1970's is made irrefutable by her deposition testimony. At her deposition on November 5, 1986, plaintiff testified as follows:

> Q. Do you recall ever having the feeling that you did not want anyone to know that you may be the daughter of Hank Williams or believed yourself to be the daughter of Hank Williams?
>
> . . . .
>
> A. Yes, sir.

Shulman Aff., Ex. 2 at 332-33.

Q. Is there any reason to think that it's not true? That those were your feelings between the period of January or December '73 or January '74 through 10/17/79?

A. No, sir.

Id. at 333.

Q. Let's try to put this in prospective [sic]. We've already discussed one time in your life that you didn't want to be linked with Hank Williams; is that right?

A. Yes, sir.

Q. But you don't have a specific knowledge as to the beginning and ending period of that feeling; is that correct?

A. That's correct.

Q. Based upon this testimony and your prior testimony, you had that feeling, did you not, between, at least December '73 and 10/17/79?

. . . .

Q. Based upon this information and your prior testimony?

A. Yes, sir.

Q. It's your statement that you did not want to be identified in any way with Hank Williams between December '71 [sic] and 10/17/79 in any way, correct?

. . . .

A. That's correct.

Id. at 342-43.

As a result of her desire not to be connected with Hank, plaintiff did not attempt to contact any individual who had personal knowledge of plaintiff's parentage. Plaintiff never attempted to contact any relative of either Hank or Bobbie Jett, any of Hank's personal or professional acquaintances, Robert Stewart, the attorney for Hank's estate, author Roger Williams, or any member of the press with knowledge of the 1967-1968 proceedings. For whatever reason, plaintiff did not seriously look into her link with Hank until 1981. It is beyond dispute that plaintiff engaged in an unreasonable and inexcusable delay in bringing her claim.

The Court now turns to whether plaintiff's delay resulted in undue prejudice to the defendants. The types of prejudice that support the defense of laches include " 'the loss of evidence that would support the defendant's position,' " or the defendant having changed his position in a manner that would not have occurred if the plaintiff had acted promptly. *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 808 n.17 (8th Cir. 1979) (quoting *Tobacco Workers International Union Local 317 v. Lorillard Corp.*, 448 F.2d 949, 958 (4th Cir. 1971)), *cert. denied*, 446 U.S. 913 (1980). Prejudice may also be found where a defendant has acted in reliance on the "false sense of security" that he was lulled into by the plaintiff's delay. *See Independent Bankers Assoc. v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980) (per curiam); *Helene Curtis Industries, Inc. v. Church & Dwight Co., Inc.*, 560 F.2d 1325, 1334 (7th Cir. 1977), *cert. denied*, 434 U.S. 1070 (1978); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena*, 433 F.2d 686, 704 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971).

The prejudice suffered by the defendants in this case is profound. Obviously, their first line of defense to plaintiff's claim is that she is not Hank's biological daughter. However, the events leading up to her birth took place in 1952. Thus, even if plaintiff proceeded promptly during the middle to late 1970's, the defendants would confront the obstacles of fading memories and lost proof. This problem is grossly exacerbated by plaintiff's decision to forgo pursuing a connection with Hank's legacy during the 1970's, only to turn around in the 1980's and stake a claim to his estate. As noted earlier, in the years since plaintiff first knew of her possible relationship with Hank, individuals with personal knowledge of relevant events have died. In the forefront of these individuals is Bobbie Jett, who died in California during 1974. Her testimony, either in person or preserved in a deposition, would be most important evidence in the case. Moreover, those individuals who would be available to testify have recollections of the pertinent events that have faded and become less reliable over time. This fact is very clear when one reads the depositions submitted by plaintiff in support of her motion for partial summary judgment.

The defendants have also suffered undue prejudice in that they have entered financial and business transactions during the period of plaintiff's inertia based on the belief that Hank Williams, Jr. was Hank's only child. FRMI, Milene and their trustees made warranties on the copyrights when they sold their interest. ARO and MOM purchased the assets of FRMI and Milene, and the relevant copyrights, before learning of plaintiff's allegations. Moreover, all of the defendants who realized income

derived from the exploitation of the copyrights paid income taxes based on those proceeds. These defendants now face a situation where, if plaintiff prevailed, they would lose the money paid in taxes that was based on a share of the copyright royalties that was above the accurate amount, or face the daunting and costly task of seeking to recover these monies from the federal treasury.

It is important to note that the event which spurred plaintiff to action in December, 1981 was a conversation with Mr. Deupree that lacked any startling new revelation. He merely told her that she could be Hank's daughter, that he regretted certain actions he had taken during the 1960's and that he would assist plaintiff in discovering whether Hank was her biological father. After the conversation, Mr. Deupree sent plaintiff some articles and certain names, but did not provide plaintiff with materials that would not have been available to her had she diligently pursued the issue in the mid-1970's.

Laches is not a doctrine concerned merely with the passage of time. Rather, laches also addresses the changes in conditions and relationships which are intertwined with the lawsuit over that passage of time. *See Galliher v. Cadwell*, 145 U.S. 368, 373 (1892); *Lingenfelter v. Keystone Consolidated Industries, Inc.*, 691 F.2d 339, 340 (7th Cir. 1982) (per curiam). Many transactions have taken place, human memories have faded and several key people have died since plaintiff first knew that Hank Williams, Sr. might be her father. Plaintiff was an adult and made a conscious choice during the 1970's; it would be unfair to the defendants to permit plaintiff to reap the benefits of her recent change of heart.

CONCLUSION

The defendant's motion for summary judgment is granted and the complaint is hereby dismissed. The case is to be removed from the active docket of this Court.

SO ORDERED.

Dated: New York, New York
September 6, 1988

/s/ John F. Keenan
JOHN F. KEENAN
U.S.D.J.

APPENDIX D-1

SUPREME COURT OF THE UNITED STATES

No.
A-518

Hank Williams, Jr., et al.,

Petitioners

v.

Cathy Yvonne Stone

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including April 4th, 1990.

/s/ Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

Dated this 19th
day of January, 1990.

APPENDIX E-1

88-7860

In The
UNITED STATES COURT OF APPEALS
For The Second Circuit

CATHY YVONNE STONE, an individual,

Plaintiff-Appellant,

-against-

HANK WILLIAMS, JR., BILLE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a division of CHAPPELL & CO., INC., a Delaware corporation, ABERBACH ENTERPRISES, LTD., a New York corporation, ACUFF-ROSE OPRYLAND MUSIC, INC., a Tennessee corporation, MILENE-OPRYLAND MUSIC, INC., a Tennessee corporation, WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc., and Milene Music, Inc., FRED ROSE MUSIC, INC., a Tennessee corporation, and MILENE MUSIC, INC., a Tennessee corporation,

Defendants-Appellees.

From a Final Order of the United States District Court for the Southern District of New York.

JOINT APPENDIX
VOLUME I [pp. 1a-500a]

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APPENDIX E-2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CATHY YVONNE STONE, an Individual,

Plaintiff-Appellant,

V

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., A Delaware Corporation, ABERBACH ENTERPRISES, LTD., A New York Corporation, ACUFF-ROSE-OPRYLAND MUSIC, INC., a Tennessee Corporation, MILENE-OPRYLAND MUSIC, INC., a Tennessee Corporation, WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc., and Milene Music, Inc., FRED ROSE MUSIC, INC., a Tennessee Corporation, and MILENE MUSIC, INC., a Tennessee Corporation,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF NEW YORK

PETITION FOR REHEARING

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DOCKET NO. 88-7860

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CATHY YVONNE STONE, an Individual,

Plaintiff-Appellant,

V

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., A Delaware Corporation, ABERBACH ENTERPRISES, LTD., A New York Corporation, ACUFF-ROSE-OPRYLAND MUSIC, INC., a Tennessee Corporation, MILENE-OPRYLAND MUSIC, INC., a Tennessee Corporation, WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc., and Milene Music, Inc., FRED ROSE MUSIC, INC., a Tennessee Corporation, and MILENE MUSIC, INC., a Tennessee Corporation,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, appellant Cathy Yvonne Stone presents this Petition for Rehearing in the above-entitled appeal, and

in support thereof respectfully presents the following grounds.

In an Opinion dated April 21, 1989, this Court affirmed the decision of the United States District Court for the Southern District of New York granting summary judgment in favor of appellees on the ground of laches. Judgment thereon was entered on April 21, 1989. This Petition for Rehearing is timely under Rule 40(a) of the Federal Rules of Appellate Procedure.

I

A REHEARING SHOULD BE GRANTED BECAUSE THE COURT OVERLOOKED AND/OR MISAPPREHENDED CONTROLLING POINTS OF LAW

In affirming the District Court's decision, this Court overlooked and/or misapprehended the following points of law:

1. Renewal copyrights and the interests therein are created by Congress in section 304 of the 1976 Copyright Act, 17 U.S.C. §304. *Hill & Range Songs, Inc. v. Fred Rose Music, Inc.*, 570 F.2d 554, 556 (6th Cir. 1978). An owner of an interest in a renewal copyright is entitled to an accounting of his/her share of the income earned from each licensing of the renewal copyright. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 223 F.2d 252 (2d Cir. 1955). A claim for breach of that duty to account does not arise until the duty is violated – *i.e.*, when the renewal copyright is licensed and the income therefrom is not properly accounted for.

In affirming the District Court's award of summary judgment as to the entire action, this Court overlooked or

misapprehended the nature of appellant's interest in the renewal copyrights. This Court's decision divests appellant of the Congressionally-created right to her share of the income to be earned from the licenses to use the renewal copyrights (a) which appellees have granted since the action was filed and (b) which will be granted during the 37-41 years remaining in the renewal copyright terms after suit was filed, simply because she waited 1-3/4 years longer than the applicable limitations period before filing suit. Laches might bar appellant from receiving her share of the income earned from licenses granted before September 12, 1982 or even September 12, 1985. But it was a misuse of the defense and a miscarriage of justice to preclude her from receiving her share of the licensing income for the next 37-41 years. *Halcon Int'l. v. Monsanto Australia, Ltd.*, 446 F.2d 156, 159 (7th Cir.), *cert. denied*, 409 U.S. 949 (1971).

2. This Court also overlooked the continuing nature of appellees' wrongful appropriation of appellant's interest in the renewal copyrights and failed to follow the well-established principle that laches precludes only the recovery of pre-filing damages but does not bar an action from proceeding as to post-filing events. *Leinoff v. Louis Milona & Sons, Inc.*, 726 F.2d 734, 741 (9th Cir. 1984) [laches does not bar action, only recovery of pre-filing damages]; *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 105 (9th Cir.), *cert. denied*, 364 U.S. 882 (1960) [delay immaterial where only prospective relief sought]; *In Re Yarn Processing Patent Validity Litig. (No. II)*, 602 F. Supp. 159, 170 (W.D.N.C. 1984) [laches bars recovery only for acts occurring prior to filing of complaint]; *Hayden v. Chalfant Press, Inc.*, 177 F. Supp. 303, 307 (S.D. Cal. 1959),

aff'd, 281 F.2d 543 (9th Cir. 1960). *See generally*, 3 *Nimmer on Copyright*, §12.06 (1988). This rule is not limited to infringement actions. *See, e.g., Environmental Defense Fund v. Marsh*, 651 F.2d 983, 1005, n. 32 (5th Cir., Unit A, 1981).

This Court's reliance on *Haas v. Leo Feist, Inc.*, 234 F. 105 (S.D.N.Y. 1916) to support its contrary result is based on a misapprehension of that case. First, the delay was not 16 years, it was approximately 13 months. 234 F. at 106. Second, all the money that was to be earned from the infringing song was earned by the defendants before the suit was brought. *Id.* Third, Judge Hand refused to give Piantadosi, the non-innocent infringer, the benefit of the rule. *Id.* at 108. Fourth, an injunction against future infringements was granted. *Id.* at 109.[1] Fifth, the result as to the innocent infringers is questionable given the three-year statute of limitations in 17 U.S.C. §507(b).

The *Haas* opinion in fact supports appellant's position on this point. All of the money to be earned from licensing the renewal copyrights has not yet been earned; over 35 years remain. Appellees are not innocent wrongdoers; they have always known of appellant's claim. Judge Hand did not bar relief as to future events because of the delay, just the recovery of pre-filing profits.

3. This Court also overlooked the point of law that the time allowed by the statute of limitations is not counted against a plaintiff in a laches analysis, for laches is no defense to an action filed within the statute of limitations. *United States v. RePass*, 688 F.2d 154, 156 (2d Cir. 1982).

---

[1] Upon rehearing, the complaint was dismissed on an unrelated ground.

The applicable limitations period began on September 12, 1983, 17 U.S.C. §507(b) and *Mount v. Book-of-the Month Club*, 555 F.2d 1108, 1111 (2d Cir 1977). Appellant was relieved of her fillial obligations by a December 1980 telephone call from her adopted father [Jt.App. 242a, Opinion at 2957-58]. Thus, the delay to be evaluated is at most 1-3/4 years (December 1980 to September 1982), not five years as this Court decided [Opinion at 2958].

II

A REHEARING SHOULD BE GRANTED BECAUSE THE COURT OVERLOOKED AND/OR MISAPPREHENDED NUMEROUS MATERIAL FACTS

In its Opinion this Court also overlooked and/or misapprehended the following material facts:

1. The Court held that appellees were prejudiced by appellant's failure to file suit between 1980 and 1985 because "some of the key people having knowledge of the events preceding [her] birth have died since 1974 – George Deupree, Bobbi Jett and Billie Jean Williams Berlin" [Opinion at 2960]. Yet those individuals either had no first hand knowledge of the events preceding appellant's birth [Deupree], died before 1980 [Jett] or were alive when this suit was filed [Williams Berlin].[2] Moreover,

---

[2] Billie Jean Williams Berlin is still alive. If the Court meant Audrey Mae Williams rather than Billy Jean Williams Berlin, the misapprehension nevertheless remains. Audrey Mae Williams was the first wife of Williams, Sr. *Hill & Range Songs, Inc. v. Fred Rose Music, Inc.*, 403 F.Supp. 420 (M.D. Tenn. 1975), *affirmed*, 570 F.2d 554 (6th Cir. 1978). They were divorced in 1952, and she died in 1975 [Jt. App. 192a, ¶80].

Mrs. Deupree, Drayton Hamilton, Judge Emmett [sic], the Alabama P & S officials with whom appellant came in contact and numerous other percipient witnesses were alive when this suit was filed (and were deposed). No material witnesses became unavailable between 1980 and 1982 (or 1985), and thus appellees did not suffer this form of prejudice because of that delay.

2. The issue as to which the deceased witnesses supposedly would have testified – whether appellant is the natural child of Hank Williams, Sr. – was irrelevant to the District Court's decision because that court assumed she was for purposes of the motion. Furthermore, the Alabama state court held in 1987 that Williams, Sr. was her natural father. Thus, no testimony material to appellant's ancestry was lost after December, 1980.

3. This Court held appellees would be prejudiced because they "entered into numerous transactions involving Williams, Sr.'s songs . . . [which] were premised on the apparent certainty of the ownership of the songs' renewal rights – attributable to appellant's delay [Opinion at 2960-61]. In reaching that conclusion this Court overlooked the following facts:

> a) Any mechanical license granted by the appellees after September 12, 1985 was granted with full knowledge of this lawsuit. Mechanical licenses are granted for a particular use, not for a term of years. The amount of the license fee in no way depends on the number of owners of the renewal copyright being licensed. It is either negotiated on a case by case basis with the licensee or set by statute. 17 U.S.C. §115. *See Recording Indus. Ass'n of America v. Copyright Royalty Tribunal*, 662 F.2d 1, 4 (D.C. Cir. 1981).

There will be hundreds, if not thousands, of such licenses granted between September 12, 1985 and the end of the various renewal copyright terms. *See Mills Music, Inc. v. Snyder*, 469 U.S. 153, 158 (1985) and Rose Affidavit [Jt. App. 252a]. Each of these licenses will have been or will be granted with full knowledge of appellant's claim. Allowing appellant to proceed to trial to determine her right to share in the income earned from those licenses will not deprive appellees of the benefits of any position taken vis-á-vis these licenses in reliance on appellant's supposed inaction.

b) The assignment of Williams, Jr.'s interest in the renewal copyrights to the Acuff/Rose Interests in 1963 [Jt. App. 181a-82a] and the assignment of Williams Berlin's interest in the renewal copyrights to the Aberbach Interests in 1969 [Jt. App. 182a] were made long before 1980. Those agreements were negotiated *with full knowledge* of appellant's potential claim. Appellees sought to eliminate that potential claim by way of the 1967-1968 Alabama proceedings. Appellant's delay between 1980 and 1985 made no difference in those decisions.

c) The supposed prejudice to be suffered by Williams, Jr. and Williams Berlin by having to share the income received before September 1983 (or 1985) could be totally ameliorated by (1) denying appellant the right to share in that income, *Halcon Int'l., Inc. v. Monsanto Australia, Ltd., supra*, or (2) requiring appellant to reimburse them for the tax consequences (which is all they complain about). Prejudice which can be ameliorated so easily should not support a laches defense.

d) There is no competent evidence in the record to support the claim of prejudice by reason of the May 1985 acquisition by Acuff-Rose-

Opryland Music, Inc. ("ARO") and Milene Opryland Music, Inc. ("MOM"), of the assets of Acuff-Rose Publications, Inc., Milene Music, Inc. Fred Rose Music, Inc. and Acuff-Rose Songs, supposedly without knowledge of appellant's potential claim. The conclusory Wentworth Affidavit [Jt. App. 256a-260a] does not supply any such evidence. Rule 56(e) of the Federal Rules of Civil Procedure.

In fact, that affidavit and the Purchase Agreement [Jt. App. 624a-689a] evidences a ready means by which ARO and MOM can protect themselves from any such prejudice – by withholding payments due under the promissory notes pending a reevaluation of the value of the assets pursuant to ¶4 of the Purchase Agreement. [Jt. App. 260a, ¶17 and Jt. App. 638a-39a, ¶4]. MOM and ARO agreed upon the purchase price according to what they believe *they*, as the publisher, could earn from licensing all the copyrights they purchased (not just the copyrights at issue herein). It does not matter, logically or otherwise, to MOM or ARO how many individuals own interests in the renewal copyrights. However many there are, all will participate in the 50% writer's share[3] of the license fees ARO and MOM collect. ARO and MOM will collect their 50% publisher's share regardless.

The sellers of the copyrights, Acuff and Rose, knew of appellant's claim, participated in the 1967-1968 Alabama proceedings, and supposedly relied on the resulting court orders in making the representations and warranties they made to ARO and MOM. They would have

---

[3] That percentage is the "standard practice in the music publishing industry." *Harry Fox Agency, Inc. v. Mills Music, Inc.*, 720 F.2d 733, 735 (2d Cir. 1983), *reversed sub nom. Mills Music Inc. v. Snyder, supra.*

made the same *res judicata* arguments in 1980 as they made in the court below in support of their motion. There is no support for this Court's conclusion that they were lulled into a false sense of security by appellant's failure to challenge the 1967-1968 orders earlier than she did.

"Lack of diligence, standing alone, is insufficient to support a claim of laches; the party asserting the claim also must establish that it was prejudiced by the delay." *Marjorica, S.A. v. R. H. Macy & Co., Inc.*, 762 F.2d 7, 8 (2d Cir. 1985). This Court's determination that appellees will be prejudiced by reason of the delay from 1980 to 1985 is not supported by the evidence in the record. This Court misapprehended the facts upon which its determination of prejudice is based.

4. This Court misapprehended the nature of the "discussion" concerning the 1952 Williams, Sr.-Jett custody and support agreement that appellant had with Drayton Hamilton after 1980 [Opinion at 2955]. The only thing about the agreement "discussed" during that meeting was that the document was part of sealed court records. Appellant did not learn the contents of that agreement, and thus that Williams, Sr. had not abandoned her as she previously believed, until 1984 when Keith Adkinson obtained it and read it to her [Jt.App. 216a(¶70) and April 27, 1987 Stone Affidavit, ¶¶8 and 9]. She filed suit within a year after that.

III

CONCLUSION

For the foregoing reasons, appellant respectfully petitions for a rehearing of this appeal.

Dated: May 4, 1989

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 9601 Wilshire Boulevard, Penthouse, Beverly Hills, California 90210:

On May 4, 1989, I served the foregoing document described as follows: PETITION FOR REHEARING on the interested parties in this action by placing two true copies thereof enclosed in three sealed envelopes with postage thereon fully prepaid in the United States Mail at Beverly Hills, California, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare that I am employed in the office of an attorney who is a member of the bar of this Court at whose direction the service was made.

/s/ Christine H. Anderson
Christine H. Anderson

Subscribed to and sworn before me
on this 4th day of May, 1989.

/s/ Helen Montrose
Notary Public

OFFICIAL SEAL
HELEN MONTROSE
Notary Public-California
LOS ANGELES COUNTY
My Comm. Exp. Apr. 23, 1991

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APPENDIX E-3

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United STates [sic] Court of Appeals, in and for the Second circuit, held at the United States Courthouse, in the City of New York, on the 23rd day of May one thousand nine hundred and eighty-eight.

Present: HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. RICHARD J. CARDAMONE,
HON. LAWRENCE W. PIERCE,

88-7860

CATHY YVONNE STONE, and [sic] Individual,

Plaintiff-Appellant,

(FILED MAY 23 1989)

-V-

HANK WILLIAMS, JR. ET. AL.,

Defendants-Appellee,

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellant, Cathy Yvonne Stone,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is DENIED.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

APPENDIX E-4

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Second Circuit Rule 27(a) governing use of this form is reprinted on reverse of Page 2 *Note requirement that supporting affidavits be attached*

CATHY YVONNE STONE

v

HANK WILLIAMS, JR., et al.

Use short title

88-7860 *Docket Number*

NOTICE OF MOTION

state type of motion

for RECALL OF MANDATE AND ORDER GRANTING LEAVE TO FILE PETITION FOR REHEARING AND REHEARING IN BANC

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

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OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

ALAN L. SHULMAN, ESQ. **
Silverman, Shulman & Slotnick, P.C.
136 East 57th Street

New York, New York 1002
(212) 758-2020

Has consent of opposing counsel:

A. been sought? [ ] Yes [X] No

B. been obtained? [ ] Yes [X] No

Has service been effected? [X] Yes [ ] No

Is oral argument desired? [ ] Yes [X] No

(Substantive motions only)

Requested return date:

(See Second circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? [X] Yes [ ] No

B. by firm date of argument notice? [X] Yes [ ] No

C. If Yes, enter date: February 1, 1989. Decision: April 21, 1989

Judge or agency whose order is being appealed:

Honorable John F. Keenan, S.D.N.Y.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? [ ] Yes [ ] No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? [ ] Yes [ ] No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? [ ] Yes [ ] No

* Coblence, Warner, Hamilton & Smith
1370 Avenue of the Americas
New York, N.Y. 10019 (212) 957-9700

Brief statement of the relief requested:

Appellant requests that the mandate of this Court issued on June 5, 1989, be recalled in order that Appellant be permitted to file a Petition for Rehearing and Rehearing In Banc, and that said Petition be ordered filed within fourteen (14) days after this Motion is granted.

Complete Page 2 of This Form

By: *(Signature of attorney)*

/s/ Milton A. Rudin
Signed name must be printed beneath

Milton A. Rudin
Appearing for: *(Name of party)*

Cathy Yvonne Stone

Date

July 31, 1989

Appellant or Petitioner:

[XX] Plaintiff [ ] Defendant

Appellee or Respondent:

[ ] Plaintiff [ ] Defendant

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is

granted denied

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Previous requests for similar relief and disposition:

None. However, Appellant did file a Petition for Rehearing previously, which was denied on May 23, 1989.

Statement of the issue(s) presented by this motion:

Whether this Court should recall its mandate and grant Appellant leave to file a second petition for rehearing and rehearing in banc in light of *New Era Publications International ApS v. Henry Holt and Co.*, 873 F.2d 576 (2d Cir. 1989) and *Catherine Yvonne Stone v. Gulf American Fire and Casualty Co.*, Case No. 87-269 (Alabama Supreme Court, July 5, 1989).

Brief statement of the facts (*with page references to the moving papers*):

1. On April 21, 1989, the judgment of this Court affirming the District Court's decision was filed. On May 5, 1989, Appellant filed her Petition for Rehearing,

which was denied on May 23, 1989. On June 5, 1989, this Court's mandate issued. (Memorandum at 1-2.)

2. On July 5, 1989, the Alabama Supreme Court decided *Catherine Yvonne Stone v. Gulf American Fire and Casualty Co.*, Case No. 87-269. That Court held that the 1967-1968 judgments that Appellant was not an heir of Williams, Sr. had been obtained through fraud committed by Irene Smith, Robert Stewart and others, including certain of the Appellees. That court further held that Appellant is the natural daughter and an heir of Williams, Sr., and is entitled to a share of the proceeds of his estate and of the renewal copyrights commencing with August 1985 (Memorandum at 2-3).

3. On April 19, 1989, another panel of this Court decided *New Era Publications International ApS v. Henry Holt and Co.*, 873 F.2d 596 (2d Cir. 1989). That panel recognized and applied the general rule, not applied by this Court, that laches does not destroy the right or preclude all relief whatever in cases involving copyrights (Memorandum at 3-4).

Summary of the argument (*with page references to the moving papers*);

1. Because the mandate has issued, it must be recalled before Appellant can file a second petition for rehearing and/or a petition for rehearing in banc. Whether to recall the mandate is vested in this Court's discretion (Memorandum at 5).

2. A direct conflict now exists in this Circuit regarding the correct application of laches in copyright cases such as this, between this Court's decision and *New Era Publications International ApS v. Henry Holt and Co.*, 873 F.2d 576 (2d Cir. 1989) (Memorandum at 6-8).

3. A change in circumstances and conflict exists between this Court's decision and the Alabama Supreme Court's decision in *Catherine Yvonne Stone v. Gulf American Fire and Casualty Co.*, regarding Appellant's

rights to the renewal copyrights (Memorandum at 5-6).

4. The change in circumstances and these conflicts justify a recall of the mandate so that this Court's decision can be reconsidered in light of those recent decisions.

APPENDIX E-5

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CATHY YVONNE STONE v HANK WILLIAMS, JR., et al. *Use short title*	88-7860 **NOTICE OF MOTION** (filed Aug. 1, 1989) *state type of motion* for RECALL OF MANDATE AND ORDER GRANTING LEAVE TO FILE PETITION FOR REHEARING AND REMAINING IN BANC

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

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Has consent of opposing counsel:

A. been sought? [ ] Yes [X] No

B. been obtained? [ ] Yes [X] No

Has service been effected? [X] Yes [ ] No

Is oral argument desired? [ ] Yes [X] No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? [X] Yes [ ] No

B. by firm date of argument notice? [X] Yes [ ] No

C. If Yes, enter date: February 1, 1989, Decision; Judge or agency whose order is being appealed: April 21, 1989

Honorable John F. Keenan, S.D.N.Y.

OPPOSING COUNSEL: *(Name, address and tel. no of law firm and of attorney in charge of case)*

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EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? [ ] Yes [ ] No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? [ ] Yes [ ] No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? [ ] Yes [ ] No

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Brief statement of the relief requested:

Appellant requests that the mandate of this Court issued on June 5, 1989, be recalled in order that Appellant be permitted to file a Petition for Rehearing and Rehearing

In Banc, and that said Petition be ordered filed within fourteen (14) days after this Motion is granted.

Complete Page 2 of This Form

By: *(Signature of attorney)* Appearing for: *(Name of party)*

/s/ Milton A. Rudin — Cathy Yvonne Stone

Appellant or Petitioner:
[X] Plaintiff

Signed name must be printed beneath — Date

Milton A. Rudin — July 31, 1989

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is granted and the mandate of this Court issued June 5, 1989 is recalled. Appellant should file a brief not to exceed 10 pages within 14 days of the date of this order and the appellee may file an opposing brief not to exceed 10 pages within 7 days thereafter. The issue to be briefed should be confined to the issue of how the Alabama Court's finding of fraud affects our determination regarding Stone's laches.

No oral argument is granted.

Ellsworth Van Graafeiland
Richard J. Cardamone
Lawrence W. Pierce
Circuit Judge

Date

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(filed Aug 24, 1989)

APPENDIX E-6
88-7860

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CATHY YVONNE STONE, an Individual,

Plaintiff-Appellant,

V

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., A Delaware Corporation, ABERBACH ENTERPRISES, LTD., A New York Corporation, ACUFF-ROSE-OPRYLAND MUSIC, INC., a Tennessee Corporation, MILENE-OPRYLAND MUSIC, INC., a Tennessee Corporation, WESLEY H. ROSE AND ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc., and Milene Music, Inc., FRED ROSE MUSIC, INC., a Tennessee Corporation, and MILENE MUSIC, INC., a Tennessee Corporation,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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Pursuant to Fed.R.App.P. 40 and this Court's August 24, 1989 Order, Appellant submits this Petition for Rehearing. For the reasons set forth in Section II, Appellant respectfully suggests that the rehearing be held in banc.

I. THE ALABAMA SUPREME COURT'S FINDING OF FRAUD DEFEATS THE LACHES DEFENSE

There was no finding of fraud in connection with the 1967-1968 Alabama proceedings when this Court rendered its decision. Summary judgment had been entered against Appellant on that claim by the Alabama trial court. Thus this Court was not called upon to decide whether that fraud excused Appellant's delay or otherwise defeated the laches defense. The Alabama Supreme Court's finding that legal fraud was committed by Robert Stewart, Irene Smith "and others" (including Appellees) and that therefore, the 1967-1968 orders should be set aside, requires this Court to address that issue, vacate its initial decision and reverse the District Court's summary judgment.

The Alabama Supreme Court has held that Stewart, Smith "and others" concealed (1) the "clear and convincing" evidence of Appellant's paternity; (2) Stewart's belief, shared by Acuff/Rose, that Appellant was entitled to a share of the Williams, Sr. estate and of the renewal copyrights; and (3) that between 1969 and 1975, Stewart set aside a portion of the estate income in case Appellant asserted a claim. [Alabama Opinion at 6-8, 10-20 and 22-24.] The court records, including the 1952 custody/support agreement which the Alabama Court opined might have sufficed to legitimate Appellant [Id., at 31,

n.19], were sealed so that the information contained therein, just like the sealed adoption records, would remain secret forever.

The "others" include Appellees Williams, Jr., Rose and, as their assignees or successors, the "Acuff/Rose Interests". Stewart's 1962 correspondence on behalf of Irene Smith, Williams, Jr.'s guardian, during which he recognized Appellant's rights and suggested ways to terminate them, was with counsel for Rose [Opinion at 16-17]. When Irene Smith concealed the evidence of paternity, she did so as Williams, Jr.'s guardian and administratrix of the estate [*Id.* at 23-24]. When, during his testimony in the 1967-1968 proceedings, Stewart concealed what he knew about Appellant, her potential rights and his efforts to cut them off, he was the attorney for Smith and the estate [*Id.* at 12, 20, 22]. When Stewart withheld Appellant's share of the estate income, he so advised counsel for Williams, Jr. [*Id.* at 19]. He also advised Williams, Jr.'s counsel in 1974 that Appellant had picked up her homestead allowance and warned that "further trouble may ensue" [*Id.*]. Williams, Jr. never disavowed Stewart's actions and went along with the concealment.

Even if one assumes he was not actively involved in the fraud, Williams, Jr. is charged with Stewart's (and Smith's) fraud by virtue of his relationship with them. Stewart was representing Williams, Jr. (by way of Smith) when he conspired with Acuff/Rose's counsel. After Williams, Jr. was represented by other counsel, Stewart plotted with that counsel as he had with Acuff/Rose's counsel. Under Alabama law, "[i]t is elementary that omissions and commissions of an attorney at law are to

be regarded as acts of the client whom he represents." *Lawrence v. Gayle*, 312 So.2d 385, 387 (Ala. 1975). As Acuff/Rose's principal with respect to the renewals, Williams, Jr. is charged with their conduct as well. *Arkel Land Co. v. Cagle*, 445 So.2d 858, 862 (Ala. 1983) [agent's (attorney) misrepresentation imputed to principal (client)].

The Acuff/Rose Interests also must be charged with the fraud because they conspired with Stewart and Smith. [Opinion at 16-17]. Under Alabama law, a co-conspirator is liable for the acts of each of the other co-conspirators and is liable to anyone injured by those acts. *Stokely v. State*, 49 So.2d 284, 291 (Ala. 1950). To the extent Tennessee law might apply, the result is the same. *Hardwin v. Caldwell*, 695 S.W.2d 189 (Tenn. Ct. App. 1985).

The reason for the concealment is obvious. Had Appellant's renewal rights been recognized in 1968, she would have been entitled to publish the songs through a publisher of her own choosing. Acuff/Rose no longer would be the only authorized publisher and its substantial income from that catalogue would be cut in half. Williams, Jr.'s writer's share of the income also would be cut in half. Lest there be any doubt about their motives, one need only note how vigorously these Appellees fought the Aberbach Interests' claim for six years. *Hill & Range Songs, Inc. v. Fred Rose Music, Inc.*, 403 F.Supp. 420 (M.D. Tenn. 1975), *aff'd*, 570 F.2d 554 (6th Cir. 1978).

Berlin and the Aberbach Interests joined the conspiracy in 1973 when they learned of the custody/support agreement and agreed to conceal it's [sic] contents. [Opening Brief at 33-34]. Their reason for doing so was the same as Acuff/Rose's – to avoid sharing the income

with Appellant. Those who join a conspiracy are liable for all the acts in furtherance of the conspiracy, even those which occurred before they joined. *Killough v. State*, 438 So.2d 311 (Ala. Cr. App. 1982); *State v. Lequire*, 634 S.W.2d 608 (Tenn. Cr. App. 1981). Appellees conspired to deprive Appellant of her renewal rights even though they owed a fiduciary duty to her and held her share of the income in trust for her. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F.2d 569 (2d Cir.), *modified*, 223 F.2d 252 (2d Cir. 1955).

This Court, like the Alabama Supreme Court, should refuse to reward Appellees' unconscionable conduct and reject their laches defense. As stated in *Holmberg v. Armbrecht*, 327 U.S. 392 (1946):

> "If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct by the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.
>
> Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense . . . ." 327 U.S. at 396-97.

In *McIntire v. Pryor*, 173 U.S. 38 (1899), the Supreme Court rejected a laches defense because the defendant had engaged in fraud which was as calculated and flagrant as found by the Alabama Court, stating:

> "in case of actual fraud, a delay, even greater than that permitted by the statute of limitations, is not fatal to the plaintiff's claim [and] where the fraud is clearly proven, the court will look with much more indulgence upon any disability

> under which the plaintiff may labor, as excusing his delay." 173 U.S. at 54, 59.

Had there been no fraud, the 1967-1968 rulings probably would have been different [Opinion at 24]. Appellant (and her adoptive parents) would have known Williams, Sr. had not abandoned her, that upon his death she was adopted by his mother, and that she had been placed for adoption by Smith for the latter's selfish motives.[1] Knowing of Williams, Jr.'s [sic] desires and Mrs. Stone's treating her as one of the family would have made Appellant and the Deuprees think very differently about pursuing her ancestry in 1967. At the very least, these issues must be tried.

Even if Appellees' fraud does not excuse Appellant's delay, it defeats the laches defense under the unclean hands doctrine. This doctrine is as strongly rooted in societal interests and public policy as is laches. As stated in *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806 (1945):

> "That doctrine is rooted in the historical concept of [a] court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abetter of iniquity.' . . . Thus while 'equity does not demand that its suitors shall have led blameless lives,' . . . as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue.

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[1] Smith's selfish motives extended to defeating Appellant's attempt to inherit under Mrs. Stone's will. *Hamilton v. Smith*, 86 So.2d 283 (Ala. 1956).

> " . . . Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor." 324 U.S. at 814-15.

A defendant's unclean hands defeats its laches defense. *Bott v. Four Star Corp.*, 807 F.2d 1567, 1576 (Fed. Cir. 1986); *TWM Mfg. Co. v. Dura Corp.*, 592 F.2d 346, 349 (6th Cir. 1979), *aff'd. after remand*, 722 F.2d 1261, 1268 (6th Cir. 1983); *National Circle Daughters of Isabella v. National Order of Daughters of Isabella, 270 F. 723, 732-34 (2d Cir. 1920), cert. denied*, 255 U.S. 571 (1921); *Haas v. Leo Feist, Inc.*, 234 F. 105, 108 (S.D.N.Y. 1916). Appellees' fraud constitutes unclean hands and defeats their laches defense.

The defense should also fail because Appellees cannot establish any prejudice other than circumstances which their fraud produced. Had there been full disclosure in 1967 and 1968, the issues would have been adjudicated while the witnesses whose deaths this Court identified as a form of prejudice (873 F.2d at 625) were still alive. The "circumstances giving rise to this appeal [would not] have spanned over two decades" (*Id.*) without a resolution. To the extent there is support for the Court's conjecture that witness recollections had faded during 1981-1985 (*Id.*), those recollections undoubtedly would have been more vivid in 1968. To the extent Appellees entered into transactions "premised on the apparent certainty" of their ownership of the renewal rights by reason of the 1967-1968 rulings (*Id.* at 625-26),[2] that

---

[2] Appellant disputes this assumption. *See*, Petition for Rehearing at 6-10. There is no danger that innocent third parties

(Continued on following page)

apparent certainty was the product of calculated fraud. Appellees should not be able to claim prejudice from circumstances they created. *Kama Rippa Music, Inc. v. Schekeryk*, 510 F.2d 837, 843-44 (2d Cir. 1975); *National Circle, Daughters of Isabella v. National Order, Daughters of Isabella, supra*, 270 F. at 734.

Appellees had no reasonable basis to assume Appellant believed her renewal rights were worthless or had abandoned them, *Galliher v. Cadwell*, 146 U.S. 368, 372 (1892), for they had obtained through fraud orders that she had no such rights. Because of those orders, Mrs. Deupree told Appellant everything regarding her relationship to Williams, Sr. had been decided against her. 873 F.2d at 622. Appellees always have had the information necessary to determine Appellant's rights and could have filed an action to declare those rights at any time before 1981. This knowledge and ability to preserve relevant evidence by way of litigation defeats the claim of prejudice. *Hill v. W. Bruns & Co.*, 498 F.2d 565, 568-69 (2d Cir. 1974); *Vega v. The Malula*, 291 F.2d 415, 419-20 (5th Cir. 1961).[3]

(Continued from previous page)

will suffer if Appellant's rights are recognized. Licenses granted by one copyright owner are binding on all co-owners. *McKay v. Columbia Broadcasting Systems, Inc.*, 324 F.2d 762, 763 (2d Cir. 1963). Recognition of Appellant's status will not invalidate any of the licenses or in any way affect the licensees' rights thereunder.

[3] The Alabama Court's decision also disposes of Appellees' other defenses as a matter of law. The fraud tolls the statute of limitations until Appellant learned the contents of

(Continued on following page)

Finally, as this Court recognized, laches is found only where the prejudice proximately results from the delay. 873 F.2d at 625. Appellees concede they relied on the 1967-1968 rulings as having determined Appellant's status and rights adversely to her and those orders being *res judicata* or collateral estoppel in any claim she might later assert. [Joint Brief at 30]. In and after 1975, Appellees acted in reliance on those orders being final, not on Appellant's failure to claim her renewal copyright interests between 1981 and 1985 [*Id.*, Jt. App. 250a, 253a]. The Alabama Court has set those orders aside, rejecting the argument that Appellant's third-party claim for such relief was time-barred. [Opinion at 27-29]. Any economic detriment from now having to recognize Appellant's statutory rights[4] results from the 1967-1968 orders having been set aside in the Alabama litigation, not Appellant's failure to file this lawsuit before 1981. The necessary proximate cause is missing.

(Continued from previous page)

the custody/support agreement in 1984. *Holmberg v. Armbrecht, supra.* Even if the limitations period began earlier, Appellant is entitled to an accounting back to September 12, 1982. *Mount v. Book-of-the-Month Club, Inc.*, 555 F.2d 1108 (2d Cir. 1977). The fraud defeats Appellees' *res judicata* and collateral estoppel defenses [Opinion at 27]. That Appellant is an heir [*Id.* at 29-40] means, without more, that she owns an interest in those renewals governed by the 1909 Act. *DeSylva v. Ballentine*, 351 U.S. 570 (1956). That Appellant is a natural child means, without more, that she owns an interest in those renewals governed by the 1976 Act. 17 U.S.C. § 101. This Court can order a speedy and efficient resolution of this matter by remanding with directions to order the requested accounting without the need for further proceedings.

[4] Which is not prejudice for laches purposes. *In re Bohart*, 743 F.2d 313, 327 (5th Cir. 1984).

II. THE REHEARING SHOULD BE IN BANC

The rehearing should be in banc because this Court's decision conflicts with *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960), which held that an author's assignment does not eliminate his executor's renewal interest under § 24 of the 1909 Act because that interest belongs only to the executor. "The right to obtain a renewal copyright and the renewal copyright itself exist only by reason of the Act and are derived solely and directly from it." 362 U.S. at 375. The Court held it would be an impermissible judicial redesigning of the statute to eliminate the executor's Congressionally-granted renewal rights by applying the "usual rule" that an executor takes estate assets subject to the testator's prior contracts. *Id.* at 377.

This Court's decision does just that by adding a deadline for establishing renewal copyright ownership which is not in the statute and which will differ depending on how different courts view necessarily unique combinations of delay, excuses and prejudice.[5] Before this Court's decision, members of the specified classes became possessed of their interests automatically upon the occurrence of the statutorily-prescribed circumstances. *Miller Music*, 362 U.S. at 375-78. This Court's judicial legislation makes unpredictable what Congress sought to simplify and make certain by enacting the 1976 Act.

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[5] The laches deadline in this case was inserted by way of a summary judgment motion held under submission for 13 months and deprives Appellant of her statutory rights for the 37-43 years remaining in the renewals.

An additional reason for an in banc rehearing is that the decision conflicts with *Menendez v. Holt*, 128 U.S. 514 (1888) and *New Era Publications ApS v. Henry Holt & Co., Inc.*, 873 F.2d 576 (2d Cir. 1989) by applying laches to divest Appellant of her renewal rights rather than only denying her an accounting of the pre-complaint licensing of those rights. This conflict will generate confusion as to the parties' rights under the Alabama Court's decision, which establishes the factual prerequisites to Appellant's ownership of the renewals. Appellees will argue this Court's decision precludes Appellant from asserting such rights. The resulting uncertainty, not only between the parties but also in the public's mind because of the press reports of the conflicting decisions, will have to be settled in future litigation.

Appellant is prevented from presenting these arguments in greater detail by the page limit set in the August 24, 1989 order, and respectfully directs the Court's attention to pages 19-31 of her Petition for Writ of Certiorari filed on August 19, 1989. That Petition, excluding the Appendices, is attached hereto.

Dated: September 6, 1989

Respectfully submitted,

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ADDENDUM A

[Omitted, see App. F-1]

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 9601 Wilshire Boulevard, Suite 800, Beverly Hills, California 90210:

On September 6, 1989, I served the foregoing document described as follows: PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC on the interested parties in this action by placing two true copies thereof enclosed in three separate sealed envelopes with postage thereon fully prepaid in the United States Mail at Beverly Hills, California, each labeled with one of the following addresses:

SEE ATTACHED SERVICE LIST

I declare that I am employed in the office of an attorney who is a member of the bar of this Court at whose direction the service was made.

/s/ Christine H. Anderson
Christine H. Anderson

Subscribed to and sworn before me
on this 6th day of September, 1989.

/s/ Helen Montrose
Notary Public

OFFICIAL SEAL
HELEN MONTROSE
Notary Public - California
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(SEAL)

My Comm. Exp. Apr. 23, 1991

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APPENDIX F-1

No. ___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

CATHY YVONNE STONE,

Petitioner,

vs.

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., ABERBACH ENTERPRISES, LTD., ACUFF-ROSE-OPRYLAND MUSIC, INC., MILENE-OPRYLAND MUSIC, INC., WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc., and MILENE MUSIC, INC., MILENE MUSIC INC., FRED ROSE MUSIC INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

1. Whether a court can divest owners of Congressionally-granted renewal copyrights of their interests and reallocate them to others by dismissing actions to declare and enforce those rights on the grounds of laches.

a) Whether denying to owners of renewal copyright interests the opportunity to obtain a judicial declaration of those rights on the ground of laches, thereby reallocating the interests to others, judicially redesigns former 17 U.S.C. §24 and present 17 U.S.C. §304(a) in violation of *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960), and adds conditions to such ownership which Congress has not required.

2. Whether the Court of Appeals' decision denying Petitioner's request that she be declared the owner of an interest in the renewal copyrights to the over 100 songs written by Hiriam "Hank" Williams conflicts with the Alabama Supreme Court's decision in *Stone v. Gulf American Fire and Casualty Co.*, ___ So.2d ___ (Ala., July 5, 1989) and this Court's decision in *De Sylva v. Ballentine*, 351 U.S. 570 (1956), under which decisions Petitioner is Williams' child for purposes of §§24 and 304(a), thereby producing uncertainty, confusion and further litigation with respect to those renewal copyrights.

3. Whether the District Court's entry of summary judgment and the Court of Appeals' affirmance thereof are so devoid of evidentiary support in light of Respondents' prior knowledge of Petitioner and her rights and their fraudulent concealment of those rights from her so as to increase their financial gain, as to require this Court, in the exercise of its supervisory authority, to correct the error and prevent the great confusion and uncertainty in the future administration of the copyright laws which will result from that decision.

II. PARTIES TO THE PROCEEDINGS

Petitioner Cathy Yvonne Stone ("Petitioner") is the illegitimate daughter and heir of the late country and western songwriter and performer Hiriam "Hank" Williams ("Williams, Sr."). As such, she claims a "child's" interest in the renewal copyrights to his compositions pursuant to §24 of the Copyright Law of 1909 and §304(a) of the Copyright Law of 1976.

Respondent Hank Williams, Jr. ("Williams, Jr.") is Williams, Sr.'s son, and was the owner of a "child's" interest in those renewal copyrights before 1963, when he assigned it to a predecessor of Respondents Acuff-Rose-Opryland Music, Inc., Milene-Opryland Music, Inc., Wesley H. Rose, Roy Acuff, Fred Rose Music, Inc. and Milene Music, Inc. ("Acuff/Rose Respondents").

Respondent Billie Jean Williams Berlin ("Berlin") was Williams, Sr.'s common law or putative wife when he died in 1953. In 1975, she was held to own the "widow's" interest in the renewal copyrights which she previously had assigned to a predecessor of Respondents Aberbach

Enterprises, Ltd. and Chappell Music Company ("Aberbach Respondents"). There were no other parties to the proceedings below.

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No.___

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

CATHY YVONNE STONE,

Petitioner,

v.

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & Co., INC., ABERBACH ENTERPRISES, LTD., ACUFF-ROSE-OPRYLAND MUSIC, INC., MILENE-OPRYLAND MUSIC, INC., WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc., FRED ROSE MUSIC, INC., and MILENE MUSIC, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United State Court of Appeals for the Second Circuit, entered on April 21, 1989.

IV. OPINIONS BELOW AND IN THE PARALLEL ALABAMA LITIGATION

The Court of Appeals' opinion, reported at 873 F.2d 620 (2d Cir. 1989), is reproduced in Appendix A. The unreported opinion of the District Court for the Southern District of New York is reproduced in Appendix B. The as yet unreported July 5, 1989, Opinion of the Alabama Supreme Court in the parallel Alabama litigation is reproduced in Appendix C.

V. JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1989. A timely petition for rehearing was denied on May 23, 1989, and this petition is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

VI. STATUTES INVOLVED

Section 24 of the Copyright Law of 1909, as last amended ("1909 Act"), 17 U.S.C. §24 (1976 ed.), provided in pertinent part:

> The copyright secured by this title shall endure for twenty-eight years from the date of first publication . . . *And provided further*, That . . . the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a

further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright . . . .

Section 304 of the Copyright Law of 1976 ("1976 Act"), 17 U.S.C. §304, provides in pertinent part:

(a) Copyrights in Their First Term on January 1, 1978.

– Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for twenty-eight years from the date it was originally secured . . . *And provided further,* That . . . the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his or her next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of forty-seven years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright. . . .

(b) Copyrights in Their Renewal Term or Registered for Renewal Before January 1, 1978.

– The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of seventy-five years from the date copyright was originally secured.

VII. STATEMENT OF THE CASE

A. Statement Of Facts.

Williams, Sr. wrote over 100 musical compositions before his death intestate on January 1, 1953. Those songs were assigned to and copyrighted under the 1909 Act by predecessors of Respondent Fred Rose Music, Inc. The first of the copyrights expired in 1971, and pursuant to 1976 Act, §304(b), the renewal copyright to that composition will expire in 2018. The remaining copyrights' initial terms expired between 1974 and 1980, and the corresponding renewal copyrights will expire during the years 2022 through 2028. When this lawsuit was filed on September 12, 1985, 34 years remained in the first renewal copyright and 37 to 43 years remained in the other 100.[1]

Petitioner's natural mother was Bobbie W. Jett. While pregnant with Petitioner, Jett and Williams, Sr. executed an agreement dated October 15, 1952, which provided for,

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[1] Stated differently, only 13 years of the first and only 4 to 10 years of the other renewal copyrights had passed. The distribution of the renewal copyright expirations is as follows (the initial terms' expirations are shown in parentheses): 1 composition in 2018 (1971), 2 in 2022 (1974), 18 in 2023 (1975), 17 in 2024 (1976), 18 in 2025 (1977), 29 in 2026 (1978), 13 in 2027 (1979), and 3 in 2028 (1980).

Petitioner was denied discovery of the revenue earned from these renewals. Thus, the record below did not contain any evidence of which renewals were generating revenue and how much that revenue amounted to during the few years of their existence before the action was brought. Recently-published reports have estimated the annual income to be over $500,000. Morris, "Daughter Wins Claim To Hank's Estate", *Billboard*, July 22, 1989, at 89.

inter alia, Petitioner's custody and support. The agreement was prepared by Williams, Sr.'s attorney, Robert B. Stewart, and its execution was witnessed by Stewart and Williams, Sr.'s mother, Lillian Stone (hereinafter, "Mrs. Stone" or "grandmother"). Neither Petitioner (as yet unborn) nor Jett were represented by counsel.

By this agreement, which describes him as Petitioner's father three times, Williams, Sr. promised to pay Jett's room and board until Petitioner was born and the medical expenses incurred in connection with the birth. Petitioner was to be placed in her grandmother's care until the age of three, at which time Williams, Sr. was to have custody of her. When Petitioner turned six, her custody was to be shared between her father and mother. Williams, Sr. agreed to provide the child's sole support regardless of who had physical custody. The agreement's operative provisions are quoted in App. C, at 8-11.

Petitioner was born on January 6, 1953, five days after Williams, Sr. died. Jett left Petitioner with Mrs. Stone several days later and then moved to California. Mrs. Stone acknowledged to the Alabama Department of Pensions & Security and others that her son was Petitioner's father. Petitioner was adopted and cared for by her grandmother until the latter died in 1955. When Irene Smith, Williams, Sr.'s sister (and thus Petitioner's aunt), reneged on her promise to care for Petitioner if Mrs. Stone could not, Petitioner was made a ward of the state. Smith also acknowledged to the adoption agency representatives and others that her brother was Petitioner's father. The contemporaneous adoption records, sealed pursuant to state law, state that Williams, Sr. is Petitioner's father. Petitioner lived in a foster home until she

was placed with and, in 1959, adopted by George and Mary Deupree.

In 1960 or 1961, Fred Rose Music, Inc. began negotiating with Stewart, as counsel for Smith who was then Williams, Jr.'s guardian, to acquire Williams, Jr.'s contingent renewal copyright interests. When Fred Rose Music learned from Stewart about Petitioner and her potential claim to the Williams, Sr. estate and the renewal copyrights during these negotiations, it began discussing with Stewart how Petitioner's rights could be cut off. App. C at 37-40. Fred Rose Music suggested to Stewart that it make a nominal payment to the Alabama Welfare Department on Petitioner's behalf to terminate her rights.

Stewart advised that a token payment would not suffice because "the statutory right of [Petitioner] comes to [her] through [her] father, and since the federal courts have held this right belongs to an illegitimate, we may be faced with a difficult problem, and certainly one we would not want to litigate." App. C at 39. Stewart suggested three alternatives: (1) consider that Petitioner's rights had been lost by her adoption; (2) attempt to negotiate a "cooperative settlement" from the Welfare Department; or (3) ask the court to appoint a guardian for "other possible minors who might claim similar renewal rights." Stewart concluded that none of the alternatives guaranteed success and would require full disclosure of the facts. *Id.* at 39-40. Rather than do so and settle any question about Petitioner's rights before it acquired Williams, Jr.'s interest, Fred Rose Music embarked upon a course of conduct with Stewart and Smith to maximize the value of Williams Jr.'s interest by concealing Petitioner's rights from her and the world.

By a March 20, 1963, agreement with Smith as Williams Jr.'s guardian, Fred Rose Music was assigned his contingent renewal copyright interest in exchange for $25,000 and the royalties specified in Fred Rose Music's earlier contracts with Williams, Sr.[2] Although all parties to the assignment knew of Petitioner's interest, she is not included in the agreement's list of people warranted to be the only other "children" or "next of kin". The agreement also provided that, should any person successfully claim an interest in the renewal copyrights, any monies payable to that person would be paid solely by Williams, Jr.[3] An action was brought in the Alabama state court by Smith on Williams, Jr.'s behalf to obtain approval of the assignment. Stewart represented Smith and Williams, Jr. in that

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[2] These royalties included the industry standard 50% of mechanical license fees. *See Harry Fox Agency, Inc. v. Mills Music, Inc.*, 720 F.2d 733, 735 (2d Cir. 1983), *rev'd sub nom. Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985).

[3] Fred Rose Music and Stewart decided not to attempt to purchase Petitioner's interest because that would have required Williams, Jr. to share his royalties with her. Well aware that the assignment from Williams, Jr. had value only if he was alive when the renewal copyrights came into existence, *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 377-78 (1960), Fred Rose Music also purchased Smith's contingent interest as Williams, Sr.'s next of kin for $5,000, obtained an assignment from Smith's son of his contingent interest for no additional payment, purchased the contingent interest belonging to Williams, Sr.'s half-sister for $2,000, and that of his father for $1,500. Fred Rose Music did not approach Berlin because it erroneously believed that she had relinquished her renewal rights in 1953. *See*. pp. 16-19, *infra*.

proceeding. Petitioner's existence and relationship to Williams, Sr. was not disclosed, and the court approved the agreement.

Several years later, this assignment was challenged by Audrey Mae Williams, Williams, Sr.'s first wife and Williams, Jr.'s mother. She argued the amount paid to Williams, Jr. was unreasonably small given the value of the renewals. To justify the $25,000 payment, Smith advised the court for the first time that there might be others possessed of an interest in the renewal copyrights. Drayton Hamilton was appointed guardian *ad litem* for any unknown potential heirs.[4]

Upon learning of the circumstances surrounding Petitioner's birth and over the objections of her adoptive parents, Hamilton argued that Petitioner was an heir of Williams, Sr. and entitled to share in his estate. The 1952 custody/support agreement was disclosed for the first time as part of this proceeding. Williams, Jr. objected to the court adjudicating Petitioner's interest in the renewal copyrights, but Fred Rose Music insisted that the issue be determined so that a favorable ruling could be raised to bar any claim she might later assert. The state court ruled that Williams, Jr. was the only heir because Petitioner had not been legitimated in the manner then required by

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[4] Hamilton had acted as Petitioner's guardian *ad litem* in the probate of Mrs. Stone's will, at which time he knew only that she had been adopted by Mrs. Stone. Smith, the sole beneficiary under that will, successfully defeated Hamilton's attempt to have Petitioner, her niece, deemed to be a pretermitted heir of Mrs. Stone's. *Hamilton v. Smith*, 86 So.2d 283 (Ala. 1956).

Alabama law and had been adopted twice after Williams, Sr.'s death. That court did not rule on the issue of Petitioner's paternity, concluding that because she was not an heir, under *De Sylva v. Ballentine*, 351 U.S. 570 (1956), she could not be a child under §24 of the 1909 Act even if she was Williams, Sr.'s illegitimate daughter. The Deuprees told Hamilton not to pursue the matter further and the state court ordered him not to appeal its rulings.

Stewart replaced Smith as administrator of the Williams, Sr. estate after she was convicted of cocaine smuggling in 1969. Even though the Alabama court had ruled Petitioner was not an heir, Stewart began setting aside a portion of the estate income in case the issue was revisited and did so until the estate was closed in 1975. Petitioner submits that Stewart took this precaution because of amendments to the 1909 Act, first proposed in the mid 1960's, which provided that illegitimates were children for purposes of §24 in order to eliminate the lack of uniformity on that issue produced by this Court's direction in *De Sylva v. Ballentine, supra*, 351 U.S. at 581-82, to refer to state laws of intestate succession for that determination.[5]

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[5] This case illustrates the vice of *De Sylva v. Ballentine*'s reference to state law. Had the only issue been whether Petitioner was Williams, Sr.'s natural daughter, it could have been determined in 1968 and probably would have been decided in Petitioner's favor, as it later was in 1985. Moreover, had California rather than Alabama law applied, Petitioner would have been an heir, and thus a child for purposes of §24, because the 1952 custody/support agreement satisfied the requirements of then Calif. Prob. Code §255. 351 U.S. at 581-82. However, the Alabama court held in 1968 that it did not meet the additional requirements of the Alabama statute then in effect. Congress eliminated this disparate treatment by enacting the 1976 Act.

Though Berlin and the Aberbach Respondents were not parties to the 1967-1968 proceedings, they learned of Petitioner and her renewal rights and joined in the scheme to keep her ignorant of those rights long before this case was filed. In August 1953, Berlin, Mrs. Stone, Audrey Mae Williams and Williams, Jr.'s guardian at that time (not Smith) entered into an agreement pursuant to which Berlin relinquished her claims to the Williams, Sr. estate in exchange for $30,000. *Hill & Range Songs, Inc. v. Fred Rose Music, Inc.*, 403 F.Supp. 420, 430-31 (M.D. Tenn. 1975), *aff'd*, 570 F.2d 554 (6th Cir. 1978). Perhaps alerted by news accounts of the 1967-1968 Alabama proceedings, Hill & Range Songs, Inc., a predecessor of Respondent Aberbach, began looking for other potential claimants to the renewal copyrights. Berlin was found, and in 1969 she assigned whatever contingent interest she might have to Hill & Range. *Id.* at 423-24.

Hill & Range then filed an action seeking a declaration that (through Berlin) it was entitled to a 50% interest in the renewals. Petitioner's existence and the contents of the 1952 custody/support agreement were disclosed as part of Stewart's 1973 deposition in that case. It was agreed among the parties and Stewart that the document would not be made an exhibit or disclosed further because it was not in the best interests of either party to make the agreement part of the court record.

Fred Rose Music opposed Hill & Range's claim on the ground that by executing the 1953 settlement agreement, Berlin relinquished her renewal copyright interest. After a trial in 1975, the court ruled that the settlement agreement did not extinguish Berlin's interest in the renewals. *Id.* at 432. Williams, Jr. and the Acuff/Rose Respondents

thereafter were required to share the renewal copyright revenue with Berlin and the Aberbach Respondents regardless of any agreements they previously had entered into believing that Berlin owned no such rights. Then, in 1976, Congress enacted the new Copyright Law which, in §101, specifically included illegitimates within the definition of children for purposes of renewal copyrights. Even after these two events, Respondents took no steps to determine or acquire Petitioner's renewal rights and continued to conduct their respective businesses fully aware of those rights.

Petitioner was entitled to receive approximately $3,800 from Mrs. Stone's homestead allowance when she turned 21. As that date approached, in late 1973 Mrs. Deupree told Petitioner of the rumors that she might be Williams, Sr.'s illegitimate daughter but that the issue of her relationship to him already had been decided against her. Petitioner claimed her homestead allowance[6] in 1974, and when Stewart learned of this in April of that year, which was during the Hill & Range litigation, he advised counsel for Williams, Jr. that "trouble might ensue". App. C at 47.

Petitioner began looking into her background at this time. She read Sing a Sad Song, a biography of Williams, Sr. The possibility of an illegitimate daughter was mentioned in that book, and Petitioner thought she might be that child. The author also speculated that the child's inheritance status might be changed vis a vis copyrights

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[6] This was pursuant to a statute enacted as the result of the holding in *Hamilton v. Smith*, *supra*, 86 So. 2d at 285, n. 1.

because of unidentified proposed legislation. Petitioner attempted to learn the identity of her natural mother, and also made inquiries regarding her father. She did so not for the monetary value of the renewal copyrights, but rather to discover the identity of her natural parents. However, Petitioner was ambivalent about pursuing this investigation because of her close relationship with her adoptive parents. This conflict continued until Mr. Deupree told Petitioner in December, 1980, that he had been wrong in not allowing Hamilton to appeal the 1967 and 1968 state court rulings, and that he would help if Petitioner still wanted to find out if Williams, Sr. was her father.

Petitioner then resumed her efforts to determine her biological ancestry. She unsuccessfully tried to obtain her adoption records from the Alabama Department of Pensions & Security. In 1981 she read books and newspaper articles about Williams, Sr. and visited acquaintances and relatives of his. She found out that Jett had died in 1974, and visited with members of her natural mother's family. Petitioner also met Hamilton, who accompanied Petitioner to the courthouse and went through the public records of the earlier proceedings with her. The custody/support agreement was not in those public files and Hamilton did not discuss it with her other than to tell her the document was a sealed court record. Mr. Deupree asked his attorney, a general practitioner unfamiliar with copyright law, to assist Petitioner in her efforts, but nothing came of that.

In September 1984, Petitioner met F. Keith Adkinson, an attorney, who she subsequently married. Adkinson obtained a copy of the custody/support agreement and

read it to Petitioner over the telephone. That was when she first learned that Williams, Sr. had not intended to abandon her but rather had desired to have custody of and provide for her. After consulting with counsel experienced in copyright law, Petitioner sent notice of her claim to Respondents in August, 1985.

B. History Of The Case.

Petitioner filed this action on September 12, 1985. After discovery revealed the existence of defendants not originally named and facts giving rise to a tort claim, Petitioner amended her complaint to add those defendants and that claim. The ten persons and entities who are Respondents in this Court were defendants below. Jurisdiction in the trial court was invoked under 28 U.S.C. §§1332 and 1338 as to the first claim for relief and 28 U.S.C. §1332 and the doctrine of pendent jurisdiction as to the second.

Petitioner's third amended complaint was the operative pleading when the District Court entered its summary judgment. Her first claim for relief sought, *inter alia*, (1) a declaration that she is the natural daughter of Williams, Sr. and, as such and pursuant to §§24 and 304(a), owns a 33-1/3% interest in the renewal copyrights; (2) an accounting of the income derived from Respondents' licensing of the renewal copyrights since their inception and the imposition of a constructive trust on her share of that revenue; and (3) a declaration that the 1968 Alabama state court order was null and void to the extent it purported to deny Petitioner rights under the 1909 Act. The second claim for relief alleged that, beginning in 1960 or

1961, Williams, Jr., the Acuff/Rose Respondents and others not parties to this litigation conspired to prevent Petitioner from learning of and claiming her renewal copyright interests in order to retain for themselves the revenues earned from those copyrights.

In March 1987, Respondents filed a joint motion for summary judgment on the ground that, as a matter of law under *De Sylva v. Ballentine*, Petitioner is not Williams, Sr.'s child for purposes of renewal copyrights under either §24 or §304(a). In addition, Respondents argued the first claim for relief was barred by *res judicata*, collateral estoppel, the 1976 Act statute of limitations, laches, estoppel and waiver. Respondents also argued that the District Court lacked jurisdiction over the first claim because it did not arise under the Copyright Laws and diversity jurisdiction did not exist. The motion also sought a ruling that Petitioner's conspiracy claim did not state a claim upon which relief might be granted and/or was time-barred.

In addition to joining this motion, Berlin and the Aberbach Respondents filed a separate motion for partial summary judgment seeking a determination that, even if Petitioner possessed an interest in the renewal copyrights, she, Williams, Jr. and the Acuff/Rose Respondents should share the children's 50% interest while Berlin and the Aberbach Respondents should share the widow's 50% interest.[7] Petitioner filed a cross-motion for partial summary judgment seeking a declaration that, as a biological

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[7] This Court left that question open in *De Sylva v. Ballentine, supra*, 351 U.S. at 582.

child of Williams, Sr., she was entitled to a 33-1/3% interest in the renewal copyrights.

The motions were argued on August 6, 1987 and taken under submission. Thirteen months later the District Court granted Respondents' joint motion, but on the sole ground that Petitioner had been guilty of laches. The District Court assumed for purposes of its decision that Petitioner was Williams, Sr.'s natural child,[8] but held as a matter of law that she had unreasonably delayed pursuing her claim between 1974 and 1981, and on the basis of conclusory affidavits, that Respondents would be prejudiced if the case was allowed to proceed [App. B. at 31, 33-37]. The District Court did not reach any of the other significant issues presented in the joint motion for summary judgment, the motion for partial summary judgment filed by Berlin and the Aberbach Respondents or Petitioner's cross-motion for partial summary judgment.[9]

Petitioner appealed to the Court of Appeals for the Second Circuit. On April 21, 1989 that Court affirmed the judgment of the District Court, but on different grounds. The Court of Appeals held that Petitioner's failure to file

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[8] By this time, the trial court in the parallel Alabama litigation had found that she was Williams, Sr.'s natural daughter. That ruling had not been appealed and was final when the District Court entered its judgment.

[9] Among those were (1) whether *De Sylva v. Ballentine* or §101 of the 1976 Act controls the determination of who is a child for renewal copyright purposes after the effective date of that Act and (2) the respective ownership percentages of widows and children under §§24 and 304(a). These issues, still unresolved after many years, create uncertainty and confusion in this very important area of copyright law.

her complaint between 1974 and 1980 "may well have been entirely excusable under the circumstances." 873 F.2d at 624. It held, however, that her delay from December 1980 to September 1985 was without plausible explanation and, based upon the same conclusory affidavits, that Respondents would be prejudiced because of the death or faded recollection of certain witnesses and because Respondents had entered into transactions in reliance on Petitioner's failure to assert her claim during that time. *Id.* at 625-26. Petitioner was denied all the relief she requested, rather than being denied only an accounting of the income earned before the suit was filed but being allowed to obtain a declaration of her rights and an accounting of the revenue to be earned during the 34 to 43 years remaining in the renewal copyrights after September 1985. Petitioner's petition for rehearing was denied on May 23, 1989.[10]

C. The Parallel Alabama Litigation.

While Petitioner was prosecuting this action, litigation over her status as an heir of Williams, Sr., her rights to the copyrights, and the validity of the 1967 and 1968 orders was proceeding in Alabama as well. Respondents

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[10] On August 1, 1989, Petitioner filed a motion to recall the Court of Appeals' mandate and for leave to file a second petition for rehearing and rehearing in banc. She did so to enable the Court of Appeals to reconsider its decision in light of the Alabama Supreme Court's decision and *New Era Publications International ApS. v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989). In *New Era Publications*, another panel of the Second Circuit recognized that laches does not destroy copyright interests, but only determines the form of relief available against the alleged infringer. This motion has not yet been decided.

Williams, Jr., Acuff and Rose filed that action against Petitioner on September 10, 1985, seeking alternative declarations that (1) those orders barred her from establishing herself to be a natural child of Williams, Sr. and claiming an interest in his estate, or (2) if the orders were set aside, that the Alabama court adjudicate her rights to the copyrights and as an heir of Williams, Sr. App. C, at 3-4, n. 2. Petitioner counterclaimed, seeking a determination that she is the biological daughter of Williams, Sr and is entitled to her proportionate share of his estate.

On July 14, 1987, the trial court granted summary judgment against Petitioner on the complaint and her counterclaim, holding that because Petitioner had not been legitimated pursuant to the procedures available under Alabama law at the time of her birth or at the time of its ruling, and had been adopted by her grandmother and, subsequently, the Deuprees, she was not an heir of Williams, Sr. That court also held that the 1967 and 1968 orders barred Petitioner from relitigating this issue.

The court further found that disputed fact issues as to Petitioner's paternity required a trial of that question. That trial was held, and based upon the witnesses' testimony and documentary evidence submitted by the parties, the court held on October 26, 1987, in a ruling which is now final, that Petitioner is a natural child of Williams, Sr.

Petitioner had also filed a third party complaint against Irene Smith, Stewart's estate (later dismissed), and Stewart's now dissolved law firm, Jones, Murray and Stewart, P.C. Petitioner there alleged, *inter alia*, that the 1967 and 1968 orders had been obtained through legal

fraud committed by those third party defendants and other, fictitiously-named defendants."[11]

The trial court entered summary judgment against Petitioner on this pleading as well. It held that because Petitioner could not have been established as Williams, Sr.'s heir under the law applicable during the 1967 and 1968 proceedings, the failure by the third party defendants and others (*i.e.*, the Acuff/Rose Respondents) to disclose her existence did not give her a cause of action against them.

Petitioner appealed to the Alabama Supreme Court, which on July 5, 1989, reversed that ruling. It held that legal fraud had been committed in the 1967 and 1968 proceedings in that (1) Smith, Stewart and others had concealed from the court the circumstances surrounding Petitioner's birth and subsequent correspondence regarding her potential rights, (2) had concealed the fact that Williams, Sr., Mrs. Stone and Smith all had acknowledged that Petitioner was Williams, Sr.'s daughter, and (3) that Stewart, Smith and others, including Respondents Williams, Jr. and Rose, had affirmatively prevented Petitioner from learning of and asserting her rights to the estate and the renewal copyrights.

The Alabama Supreme Court also held that the evidence of Petitioner's paternity was clear and

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[11] Gulf American Fire and Casualty Company and its successor in interest, American States Insurance Company, the sureties on the bonds Smith and Stewart posted when they were appointed administrators of the estate, also were named third party defendants.

convincing,[12] that in 1967 and 1968 the state court erred in denying Hamilton's request to appeal its rulings, and that, because Petitioner had not been granted access to the records concerning her adoption until 1984 and had filed suit promptly thereafter, her third party complaint was not barred by laches. The Court set aside the 1967 and 1968 judgments in part, and held that Petitioner "is entitled to receive her proportionate share of any proceeds of the estate of her natural father, Hank Williams, including any income or interest, and of any copyright royalties, but prospectively only from the date she gave notice of her claim August 5, 1985." App. C at 101.

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[12] The clear and convincing evidence was that: 1) the 1952 custody and support agreement, that was drafted by Williams's attorney, refers to Hank Williams throughout as the father of the child; 2) the 1952 agreement, itself, requires a relinquishment by the mother of virtually all rights in the child to Hank Williams; 3) the 1952 agreement provided that the mother be given a one-way plane ticket to California, and that the child live with Lillian Stone, Williams's mother, for two years, during which time he would fully support the child; 4) the 1952 agreement provided that at the age of 3, the child "was to live with him [Hank Williams] continuously and be wholly and completely supported for by him, and cared for by him" (it is interesting to note that at the time this agreement was drafted, Wiiiiams, Jr., did not live with his father, but rather, lived in Tennessee with his mother, Audrey Williams; it appears, then, that Hank Williams attempted to provide the opportunity for a closer parent-child relationship with Stone, who was to live with him, than that being enjoyed by his other child); 5) Lillian Stone, Irene Smith, and other family members acknowledged and publicly held the child out as the daughter of Hank Williams; and 6) the records of the Montgomery County Department of Public Welfare repeatedly document that Stone's natural father was Hank Williams. App. C at 88, n. 23.

VIII. REASONS FOR GRANTING THE WRIT

A. The Lower Court's Decision Destroys The Uniformity And Certainty Of Renewal Copyright Ownership Under Section 24 Of The 1909 Act And Section 304 Of The 1976 Act.

Because the lower court's decision destroys the certainty and uniformity in renewal copyright ownership intended by Congress and will have a substantial destabilizing effect upon the future administration of the copyright laws, plenary review by this Court is required. *De Sylva v. Ballentine, supra,* 351 U.S. at 572. Before the lower court's decision, members of the specified classes became possessed of their interests automatically upon the occurrence of the statutorily-prescribed circumstances. *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 375-78 (1960); *Hill & Range Songs, Inc. v. Fred Rose Music, Inc., supra,* 403 F. Supp. at 432.

The only requirement (other than being a class member) was that the renewal copyright be registered in the manner and time set by statute. Even that was not required of every class member. Each class member owns an undivided interest in the renewal copyright. *De Sylva v. Ballentine, supra,* 351 U.S. at 580. Because they are joint owners, one member's registration suffices for all. *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266 (2d Cir. 1944); 1 *Nimmer On Copyright*, §9.05[E] (1988). The co-owner who files the registration holds the renewal copyright in trust for all other co-owners. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co*, 221 F.2d 569 (2d Cir. 1955), *modified*, 223 F.2d 252 (2d Cir. 1955). There was no deadline by which a particular class member had to identify himself to the co-owners and claim his proportionate

share of the interest. For example, Respondent Berlin was not so identified and her interest was not claimed until 19 years after that interest vested. *Hill & Range Songs, Inc. v. Fred Rose Music, Inc., supra.*

These settled principles are now open to question and copyright owners, their assignees and licensees, music publishers and others no longer can rely on their continued validity. By establishing a second time period of uncertain duration within which a renewal copyright interest must be asserted or forever lost, the Court of Appeals has introduced uncertainty and lack of uniformity into the carefully constructed statutory scheme. No longer is it sufficient for a class member to be alive when the renewal term begins, which is all §304(a) requires. All class members must now promptly identify themselves to each of the co-owners *and* obtain an enforceable acknowledgment of their respective interests.

Simply being identified as a co-owner is not enough under the lower court's decision. Respondents knew of Petitioner and of her renewal rights no later than 1973, years before she knew who they were and that she might have such rights. Yet that prior *actual knowledge and Respondents' efforts to keep her ignorant of her rights* was not sufficient to preserve Petitioner's interest. The lower court held she was required to do the superfluous act of advising Respondents of what they already knew and filing suit to obtain a judicial declaration of her rights more promptly than she did.

It is unknown how quickly this heretofore unnecessary step must be taken. Whether one has waited too long will depend upon how a particular court views the facts,

and different courts view the same facts differently. In this case, the District Court and Court of Appeals came to opposite conclusions with respect to which periods of delay were excusable [See pp. 28-29 *supra*]. Additionally, the failure to act by different people owning different renewal copyrights for the same length of time may result in one being divested of his copyright interest (if the court hearing that case concludes the delay was inexcusable and prejudice is established) and the other retaining his interest because a different court concludes the same delay is excusable and/or the co-owners have not been prejudiced.

This judicially-created uncertainty and lack of uniformity can even exist with respect to the same renewal copyright. If one of the defendant co-owners is responsible for the plaintiff's delay, that defendant could not succeed on a laches defense. *Holmberg v. Armbrecht*, 327 U.S. 292 [sic], 396-97 (1946). But if other defendant co-owners are innocent of wrongdoing, they could succeed on the same defense. In that not unlikely circumstance,[13] the renewal copyright interest would not be divested vis a vis the culpable co-owner but would be divested vis a vis the non-culpable co-owner.

It is permissible to fashion the scope of the accounting granted a renewal copyright owner after the property right is recognized if that is necessary to achieve equity under circumstances which are unique to a given case. It is not permissible for the ownership of the interest to be

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[13] *See, e.g., Haas v. Leo Feist Inc.*, 234 F. 105 (S.D.N.Y. 1916) [intentional and innocent infringers treated differently].

determined on a case by case basis according to circumstances which Congress did not specify in the statute.

A writ of certiorari should issue not only because of the aforesaid uncertainty and confusion, but also because the lower court's decision conflicts with *Miller Music Corp. v. Charles N. Daniels, Inc., supra.* In that case, this Court held that an author's assignment did not transfer or otherwise eliminate the executor's renewal copyright interest because that interest, by statute, belongs only to him. "The right to obtain a renewal copyright and the renewal copyright itself exist only by reason of the Act and are derived solely and directly from it." 362 U.S. at 375.

Even though executors usually obtain no greater property rights than their testators and usually take estate assets subject to any contracts entered into by their testator, this Court refused to apply those "usual rules" to renewal copyrights because §24 of the 1909 Act did not contain any such qualifications or limitations. This Court held it was not the province of the judiciary to engraft a rule on §24 which treated executors differently from the other class members, even if that rule applied to executors in all other circumstances. It was equally beyond the province of the lower court to amend §§24 and 304(a) by establishing a time limit as uncertain as laches upon the assertion of renewal rights. The lower court's decision will produce widespread confusion and uncertainty in the determination of renewal copyright ownership unless this Court corrects the error.

B. In Denying Petitioner The Opportunity to Obtain A Declaration Of Her Rights And Prospective Relief, The Court Of Appeals' Decision Conflicts With *Menendez v. Holt*, 128 U.S. 514 (1888), And Produces Confusion With The Alabama Supreme Court's Decision.

The requested writ should issue for the additional reason that the Court of Appeals' decision conflicts with the principle established in *Menendez v. Holt*, 128 U.S. 514 (1888), that, in cases such as this, laches does not preclude prospective relief. The lower court's disregard of this rule will generate confusion as to the parties' rights under the Alabama Supreme Court's decision that under Alabama law, she is an heir of Williams, Sr., and its reaffirmation of the trial court's finding that she is his natural daughter. That she is an heir, without more, makes Petitioner a child for purposes of the renewal copyrights governed by the 1909 Act. *De Sylva v. Ballentine, supra*, 351 U.S. at 582. That she is Williams, Sr.'s natural daughter, without more, makes Petitioner a child under 1976 Act, §101, and thus a renewal copyright owner under §304(a) as well. This decision, which is entitled to full faith and credit in all other courts, establishes the factual prerequisites to Petitioner's ownership of the renewal copyrights.

As the owner of an interest in those copyrights, Petitioner is entitled to license others to use, perform and copy the compositions, publish and/or perform them herself, and assert the other rights of a copyright owner under 1976 Act, §106, [sic] 17 U.S.C. §106. When it

becomes final, Petitioner also will be entitled to enforce the Alabama judgment against Williams, Jr. and the other Respondents wherever they are located, including the Second Circuit, to obtain an accounting of her proportionate share of the renewal copyright revenues earned since August 1985.

It must be expected that Respondents will argue Petitioner is not a renewal copyright owner and is not entitled to such relief because of the lower court's decision. That contention is erroneous, but the confusion and uncertainty Respondents will create by asserting it will have to be settled by an indeterminable number of lower courts. It may be that some courts will accept Respondents' argument while others reject it, producing yet more conflict and confusion.

This uncertainty and confusion is possible only because the lower court failed to apply laches properly. The ownership of renewal copyrights is a federal question, *De Sylva v. Ballentine, supra,* 351 U.S. at 580, as is the application of laches to suits seeking the declaration and enforcement of those property rights. *See, Holmberg v. Armbrecht, supra,* 327 U.S. at 395-97; *Prather v. Neva Paperbacks, Inc.,* 446 F.2d 338, 339-40 (5th Cir. 1971). The Alabama Supreme Court correctly held [App. C at 66-71] that notwithstanding her supposed delay in asserting her rights, Petitioner is entitled to her proportionate share of the revenues earned from the renewal copyrights subsequent to August 5, 1985. *See, Menendez v. Holt,* 128 U.S. 514, 523-24 (1888).

Contrary to the Alabama decision and *Menendez v. Holt,* the lower court held Petitioner was entitled to no

relief, retrospective or prospective, because of the same supposed delay. In *Menendez v. Holt*, this Court held that, absent circumstances which do not exist in this case, laches does not bar prospective relief even though it may bar an accounting or recovery of damages with respect to events occurring before the action is filed. 128 U.S. at 523-24. In that trademark infringement case, this Court rejected the argument that laches effects the forfeiture of a valid mark, stating:

> The intentional use of another's trade-mark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence, then, in the use is not innocent, and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long, and under such circumstances, as to defeat the right itself . . . Where consent by the owner to the use of his trade-mark by another is to be inferred from his knowledge and silence merely, 'it lasts no longer than the silence from which it springs. It is, in realty [sic], no more than a revocable license.' 128 U.S. at 523-24.

In *Menendez*, there was no finding that the plaintiff had authorized or otherwise affirmatively consented to the defendant's use of the infringing mark. In this case there also was no finding that Petitioner affirmatively relinquished her renewal copyrights or authorized Respondent to exploit them on her behalf. Here, as in *Menendez*, there was only inaction resulting from ignorance.

This principle has been applied in copyright infringement actions where the plaintiff has not authorized the

copying or otherwise abandoned its copyright. *See, e.g., New Era Publications International, ApS. v. Henry Holt & Co.*, 873 F.2d 576, 584-85 (2d Cir. 1989); *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 105 (9th Cir.), *cert. denied*, 364 U.S. 882 (1960); *Hayden v. Chalfant Press, Inc.*, 177 F. Supp. 303, 307 (S.D. Cal. 1959), *aff'd*, 281 F.2d 543 (9th Cir. 1960). *See generally*, 3 *Nimmer on Copyright*, §12.06 (1988).

The principle also is applied where the issue is timeliness under the Copyright Law statute of limitations, 17 U.S.C. §507(b). A failure to file suit within the limitations period will preclude only the availability of relief against a particular infringement; it does not affect in any way the copyright upon which suit is brought. *Prather v. Neva Paperbacks, Inc., supra*, 446 F.2d at 339. A plaintiff can recover damages or profits resulting from infringements occurring during the limitations period even if it took no action against infringements occurring earlier. *Mount v. Book-of-the-Month Club, Inc.*, 555 F.2d 1108, 1110 (2d Cir. 1977).[14]

It has never been held that a copyright owner's failure to sue a particular infringer, standing alone, works a forfeiture or abandonment of his ownership of the copyright. Yet that is what Respondents will argue is the result of the lower court's decision. That is an impermissable

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[14] *Prather* and *Mount* applied §115(b) of the 1909 Act, which is substantially the same as §507(b) of the 1976 Act. *Taylor v. Meirick*, 712 F.2d 1112, 1117 (7th Cir. 1983).

judicial amendment of §§24 and 304(a) which will produce great uncertainty, confusion and even more litigation in the lower courts unless this Court reverses that decision.

C. The Lower Court's Dismissal Was Based On Speculation, Not Evidence, And Denied Petitioner The Opportunity Of Having A Jury Decide The Issues.

The procedural posture of this case makes review of the Court of Appeals' decision even more necessary. In the Alabama litigation, Petitioner's status was decided at a trial. A trial on that and the other significant copyright issues in this case was precluded by the District Court's entry of summary judgment on the ground of laches, which was reviewed by the Court of Appeals under the easily satisfied abuse of discretion standard of review. 873 F.2d at 624. The lower courts held as a matter of law that Respondents would be prejudiced on the basis of conclusory affidavits which were so disingenuous as to require this Court, in the exercise of its supervisory authority, to issue the writ and determine whether such "evidence" should support the judicial legislation which occurred below.

The Court of Appeals concluded that Respondents would be prejudiced "to some degree" because "some of the key people having knowledge of the events preceding [Petitioner's] birth have died since 1974 – George Deupree, Bobbie Jett and Audrey Mae Williams."[15] 873 F.2d at

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[15] The Court of Appeals' slip opinion, reproduced as Appendix A, erroneously referred to Berlin instead of Williams at

(Continued on following page)

625. However, Petitioner's paternity was not relevant to the lower courts' decisions because both the District Court and the Court of Appeals assumed she was Williams, Sr.'s natural daughter [873 F.2d at 624, App. B at 8]. Moreover, the Alabama trial court had held she was his daughter and that decision, which was final before either of the decisions below was rendered, was entitled to full faith and credit. Thus evidence of events preceding Petitioner's birth was not material and the supposed difficulties of proof on the issue should not have been considered.

Furthermore, these three individuals either had no first hand knowledge of the events preceding Petitioner's birth [Deupree] or died before 1981, the year the Court of Appeals held that Petitioner's unreasonable delay began [Jett and Williams].[16] There were [sic] no evidentiary basis for the lower court's assumption of prejudice in this respect.

There also was no evidentiary support for the Court of Appeals' conclusion that because "the circumstances giving rise to this appeal have already spanned over two

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(Continued from previous page)

this point [App. A at 12]. Petitioner noted this error, among the many others, in her petition for rehearing. It was corrected in the opinion as reported. Audrey Mae Williams was divorced from Williams, Sr. in 1948, and again in 1952, before Petitioner was born. There is no indication whatsoever of what probative evidence she could have given.

[16] The Court of Appeals recognized that the absence of Jett's testimony "[could not] be found to prejudice [Respondents] because she would not have been alive to testify even if [Petitioner] had filed suit immediately." 873 F.2d at 625. The same is true of Audrey Williams, who died in 1975.

decades . . . the additional five years of [Petitioner's] unexcused delay doubtless would hamper the defense further. . . ." 873 F.2d at 625. There was no evidence that recollections which existed before 1981 had faded afterward; the lower court was merely speculating. Moreover, it always had been in Respondents' power to obtain a determination of the issue, just as the Aberbach Respondents did by instituting the *Hill & Range* litigation. In any event, Petitioner's was the only fading recollection mentioned, and any lack of recollection on her part would only benefit Respondents.

In fact, many of the people who had knowledge of Petitioner's paternity, her efforts to ascertain her ancestry and Respondents' alleged prejudice (the only fact issues relevant to laches) were alive after this case was filed and were deposed. These include Petitioner, Respondents, Smith, Mrs. Deupree, Jett's uncle, the judge who presided over the 1967-1968 Alabama proceedings, the adoption agency representatives involved in Petitioner's adoption and her later efforts to obtain the records, Hamilton, the friends and relatives of Williams, Sr. with whom Petitioner spoke, and the friends of Petitioner with whom she discussed her possible connection with Williams, Sr. The custody/support agreement, the correspondence about Petitioner, and the adoption agency and court records, all of which were contemporaneously-created, also were readily available to all parties in this case.

The lower courts held Respondents would be prejudiced because of the "numerous transactions involving Williams, Sr.'s songs" which they entered into. 873 F.2d at 625. No doubt the Acuff/Rose and Aberbach Respondents have granted numerous licenses under the renewal

copyrights. However, those licenses are granted for a specific use, not for a term of years, and the amount of the fee does not depend on the number of owners of the renewal copyright being licensed. The fee is either negotiated or set by the compulsory license statute. 17 U.S.C. §115. *See, Recording Indus. Ass'n. of America v. Copyright Royalty Tribunal*, 662 F.2d 1, 4 (D.C. Cir. 1981). *See also, Mills Music, Inc. v. Snyder*, 469 U.S. 153, 157-58 (1985). Thus, these transactions could not support a finding of prejudice because they would have been on the same terms even if Petitioner had asserted her claim earlier. The Court of Appeals' reference to opportunity costs of other ventures not pursued was mere conjecture, as that court recognized. 873 F.2d at 626.

Williams, Jr. assigned away his renewal copyright interest in 1963 and Berlin assigned away her interest in 1969. Those Respondents' rights and duties under those agreements, including the standard royalties they were to be paid, were fixed long before Petitioner's supposed unreasonable delay began in 1981. Neither of these Respondents could have been lulled into a false sense of security by Petitioner's failure to challenge the 1967 and 1968 rulings earlier than she did, 873 F.2d at 626, because the Williams, Jr. assignment occurred before those rulings and Berlin's renewal copyright interest was not determined until 7 years after they were made. There was no evidence that either of these Respondents acted or failed to act during 1981-1985 because of Petitioner's failure to assert her claim during that time. The only "prejudice" they faced was that they might have to share their portion of the revenue with Petitioner, just as Williams, Jr. and the Acuff/Rose Respondents had been required to

share the revenue with Berlin and the Aberbach Respondents beginning in 1975. Such pecuniary detriment is not the type of prejudice which supports a laches defense. *In re Bohart*, 743 F.2d 313, 327 (5th Cir. 1984).

The only transaction entered into during the period of supposed delay was the May 1985 acquisition by Respondents Acuff-Rose-Oryland Music, Inc. and Milene Opryland Music, Inc. of the assets of certain of the other Acuff/ Rose Respondents. However, that purchase agreement includes a provision which protects those Respondents from losses resulting from claims such as Petitioner's. It allows them to withhold payments due the sellers pending a revaluation of the assets in light of the claim. Moreover, those Respondents valued the assets (which include more than the Williams, Sr. renewal copyrights) based on what they believed the 50% publishers' share of the revenue would be, which is all they ever would keep. How many people might have to participate in the writers' 50% share of that revenue is of no concern to them.

Petitioner respectfully submits that plenary review of the lower court's decision is required not simply because it is erroneous, but because that error will create great confusion and uncertainty in the future administration of the copyright laws. The Court of Appeals redesigned §§24 and 304(a) by adding a time period of uncertain duration in which to take action the statutes do not require. That it did so on the basis of conjecture in reviewing a summary judgment makes plenary review by this Court imperative.

IX. CONCLUSION

De Sylva v. Ballentine created the likelihood that similarly situated individuals would be treated differently with respect to ownership of renewal copyrights. Congress eliminated that unjust condition when it enacted the 1976 Act. The lower court's decision once again creates uncertainty and lack of uniformity in this very important area of copyright law, which can only be resolved by this Court. For these various reasons, Petitioner respectfully requests that her petition be granted.

Respectfully submitted,

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August 18, 1989

APPENDIX F-2

No. 89-295

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

CATHY YVONNE STONE,

Petitioner,

v.

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, A Division of CHAPPELL & CO., INC., ABERBACH ENTERPRISES, LTD., ACUFF-ROSE-OPRYLAND MUSIC, INC., MILENE-OPRYLAND MUSIC, INC., WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc., FRED ROSE MUSIC, INC., and MILENE MUSIC, INC.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit

MOTION TO DEFER CONSIDERATION
OF PETITION FOR WRIT OF CERTIORARI

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Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit

MOTION TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

Petitioner Cathy Yvonne Stone ("Petitioner") hereby respectfully moves the Court to defer consideration of her Petition for Writ of Certiorari until after the Court of Appeals for the Second Circuit has ruled on her Petition for Rehearing and Suggestion for Rehearing In Banc. In the alternative, Petitioner respectfully moves that consideration of her Petition be deferred for an initial period of 60 days, with leave granted to permit Petitioner to file another motion to defer consideration if the Court of Appeals has not ruled by the end of the initial period. *See, e.g., Murray v. City of New York*, 308 U.S. 528 (1940), 309 U.S. 696 (1940), 310 U.S. 610 (1940). As grounds for said motions, Petitioner states as follows:

1. The Court of Appeals entered its judgment and opinion on April 21, 1989, which is reported at 873 F.2d 620 (2d Cir. 1989). Petitioner timely filed a Petition for Rehearing. That Petition was denied on May 23, 1989, requiring Petitioner to file her Petition for Writ of Certiorari no later than August 21, 1989. Supreme Court Rule 20.4.

2. On August 1, 1989, Petitioner filed a Motion for Recall on Mandate and Order Granting Leave to File Petition for Rehearing and Rehearing In Banc in the Court of Appeals. She did so to enable that Court to reconsider its decision in light of the Alabama Supreme Court's decision in *Stone v. Gulf American Fire and Casualty Co.*, ___ So.2d ___ (Ala., July 5, 1989) and *New Era Publications International ApS. v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989), both of which Petitioner submits conflict with the court of Appeals' decision in this case.

3. The Court of Appeals had not ruled on that motion by the time the Petition for Writ of Certiorari was due. That Petition was filed on August 19, 1989 and Petitioner advised the Court of the then current status of the proceedings in the Court of Appeals (Petition at 30, n. 10).

4. On August 27, 1989, the Court of Appeals recalled its mandate and granted Petitioner leave to file a Petition for Rehearing and Suggestion for Rehearing In Banc. Petitioner did so on September 6, 1989, and Respondents timely filed their briefs in opposition to the Petition. The Petition has been pending before the Court of Appeals since September 14, 1989. Petitioner cannot determine when that Court will render its decision.

5. Respondents were granted an extension of time until October 17, 1989 in which to file their Opposition to the Petition for Writ of Certiorari pursuant to Supreme Court Rule 29.4. That Opposition has now been filed.

6. Should the Court of Appeals grant the Petition for Rehearing, vacate its earlier opinion and reverse the decision of the District Court, there will be no need for this Court to consider the Petition for Writ of Certiorari because it will be moot. *Cf. S.E.C. v. Medical Committee for Human Rights*, 404 U.S. 403 (1972).

7. If the Court of Appeals grants the Petition but nevertheless affirms the District Court on grounds different from those stated in its decision, the questions to be addressed by this Court may change from those stated in the current Petition. Petitioner would be entitled to seek this Court's review of that new decision by way of a new Petition for Writ of Certiorari.

For the foregoing reasons, Petitioner respectfully requests that consideration of her Petition for Writ of Certiorari be deferred (a) until after the Court of Appeals has ruled on her Petition for Rehearing, or, in the alternative, (b) for 60 days to allow the Court of Appeals to rule on that Petition. R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice*, §5.9 (6th ed. 1986). Petitioner will advise this Court promptly when the Court of Appeals renders its decision.

October 23, 1989

Respectfully submitted,

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No. 89-295

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October Term, 1989

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v.

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Respondents.

CERTIFICATE OF SERVICE

I, MILTON A. RUDIN, a member of the Bar of the Supreme Court of the United States, hereby certify that on October 23, 1989, one copy of the foregoing Motion to Defer Consideration of Petition for Writ of Certiorari in the above-entitled case was mailed, first class postage prepaid, to each of the following counsel of record for the Respondents herein. I further certify that all parties required to be served have been served.

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APPENDIX F-3

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
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November 6, 1989

Mr. Lawrence I. Fox
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Re: Cathy Yvonne Stone,
v. Hank Williams, Jr., et al.
No. 89-295

Dear Mr. Fox:

The Court today entered the following order in the above entitled case:

The motion of petitioner to defer consideration of the petition for certiorari is denied. The petition for a writ of certiorari is denied.

Very truly yours,

Joseph F. Spaniel, Jr., Clerk

No. _____

Supreme Court, U.S.
FILED
APR 4 1990
JOSEPH F. SAPNIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., ABERBACH ENTERPRISES, LTD., ACUFF-ROSE-OPRYLAND MUSIC, INC., MILENE-OPRYLAND MUSIC, INC., WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc., FRED ROSE MUSIC, INC., and MILENE MUSIC, INC.,

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vs.

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Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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VOLUME II

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CATHY YVONNE STONE, an individual, Plaintiff, vs. HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a division of CHAPPELL & CO., INC., a Delaware corporation, ABERBACH ENTERPRISES, LTD., a New York corporation, ACUFF-ROSE-OPRYLAND MUSIC, INC., a Tennessee corporation, MILENE-OPRYLAND MUSIC, INC., a Tennessee corporation, WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc., FRED ROSE MUSIC, INC., a Tennessee corporation, and MILENE MUSIC, INC., a Tennessee corporation, Defendants.	CASE NO. 85 Civ. 7133 THIRD AMENDED COMPLAINT FOR (1) DECLARATORY RELIEF, ACCOUNTING, DAMAGES, IMPOSITION OF CONSTRUCTIVE TRUST AND/OR A RESULTING TRUST, AND (2) CONSPIRACY TO DEFRAUD AND BREACH FIDUCIARY DUTY DEMAND FOR JURY TRIAL

Plaintiff alleges as follows:

PARTIES

1. Plaintiff Cathy Yvonne Stone is a citizen of the State of Maryland.

2. Plaintiff is informed and believes and based thereon alleges that defendant Hank Williams, Jr. (hereinafter "Williams Jr.") is, and at all times herein relevant was, a citizen of the State of Alabama.

3. Plaintiff is informed and believes and based thereon alleges that defendant Billie Jean Williams Berlin (hereinafter "Berlin") is, and at all times herein relvant [sic] was, a citizen of the State of Louisiana.

4. Plaintiff is informed and believes and based thereon alleges that Chappell Music Company, a division of Chappell & Co., Inc. (hereinafter "Chappell"), is a corporation incorporated under the laws of the State of Delaware having its principal place of business in New York, New York. Plaintiff is informed and believes and based thereon alleges that defendant Aberbach Enterprises, Ltd. (hereinafter "Aberbach") is a corporation incorporated under the laws of the State of New York, having its principal place of business in New York, New York. Both Aberbach and Chappell have, at all times relevant hereto, been engaged in the business of music publishing.

5. Plaintiff is informed and believes and based thereon alleges that defendants Acuff-Rose-Opryland

Music, Inc. (hereinafter "ARO Music") and Milene-Opryland Music, Inc. (hereinafter "MOM Music") are corporations organized under the laws of the State of Tennessee, doing business in New York, New York, and are, and at all times hereto relevant have been, in the business of music publishing.

6. Plaintiff is informed and believes and based thereon alleges that defendant Wesley H. Rose (hereinafter "Rose") is, and at all times herein relevant was, a citizen of the State of Tennessee.

7. Plaintiff is informed and believes and based thereon alleges that defendant Roy Acuff (hereinafter "Acuff") is, and at all times herein relevant was, a citizen of the State of Tennessee.

8. Plaintiff is informed and believes and based thereon alleges that Fred Rose Music, Inc. (hereinafter "Fred Rose") was at all times herein relevant a corporation incorporated under the laws of the State of Tennessee, having its principal place of business in Tennessee.

9. Plaintiff is informed and believes and based thereon alleges that defendant Milene Music, Inc. (hereinafter "Milene") was at all times herein relevant a corporation incorporated under the laws of the State of Tennessee, having its principal place of business in Tennessee.

10. Plaintiff is informed and believes and based thereon alleges that individual defendants Rose and Acuff are the Trustees in Liquidation for stockholders of Fred Rose and Milene, which claim to have heretofore acquired renewal rights in musical compositions and

works written and/or composed by Hiriam "Hank" Williams (hereinafter "Williams Sr.").

11. Plaintiff is informed and believes and based thereon alleges that at all times herein relevant each defendant was and is acting as the agent of each other.

JURISDICTION AND VENUE

12. This court has jurisdiction over plaintiff's first claim for relief as alleged herein because such claim arises under the copyright laws of the United States, and more particularly, the Copyright Act of 1976, 17 U.S.C. §§101, *et seq.*

13. This court has jurisdiction over plaintiff's first and second claims for relief pursuant to the provisions of Title 28, United States Code, §1332(a)(2), providing jurisdiction in this court to hear and decide matters between parties of diverse citizenship where the amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs.

14. This court has jurisdiction over plaintiff's second claim for relief because it results from the transactions and occurrences which form the basis of plaintiff's first claim for relief and this court therefore has ancillary and/or pendant jurisdiction over the second claim for relief.

15. Plaintiff is informed and believes and based thereon alleges that corporate defendants Chappell, Aberbach, ARO Music, MOM Music, Milene and Fred Rose, and Acuff and Rose in their individual capacities and as Trustees in Liquidation for stockholders of Fred Rose and

Milene, have continuously and systematically conducted substantial and extensive business within this judicial district. Plaintiff is informed and believes and based thereon alleges that individual defendants Berlin and Williams Jr. have continuously and systematically done business in the State of New York and within this judicial district through their agents, Aberbach, Chappell, ARO Music, and MOM Music, respectively, in that, among other things, Aberbach, Chappell, ARO Music and MOM Music pay Williams Jr. and Berlin royalties and other compensation derived from their respective interests in the renewal copyrights which, as alleged more fully hereinbelow, are the subject of plaintiff's complaint. Plaintiff's cause of action therefore arises out of the contacts and transaction of business in New York by defendants, and each of them.

16. Defendants, and each of them, may be found in this judicial district as a result of, among other things, the transaction of business alleged hereinabove at paragraph 15, and venue is properly laid in the United States District Court, Southern District of New York, pursuant to 28 U.S.C. §1400(a).

FIRST CLAIM FOR RELIEF FOR DECLARATION OF RIGHTS, ACCOUNTING, DAMAGES, AND IMPOSITION OF CONSTRUCTIVE TRUST AND/OR RESULTING TRUST

17. Plaintiff incorporates herein by reference each and every allegation contained in paragraphs 1 through 16 of this Third Amended Complaint as though fully set forth herein.

18. Plaintiff is the natural daughter of Williams Sr. and Bobbie Jett (hereinafter "Jett"). Plaintiff's natural father, Williams Sr., died five days before plaintiff was born and plaintiff never knew her natural mother, Jett. Plaintiff was twice adopted as an infant and the identity of her natural parents had been actively concealed from plaintiff. Plaintiff discovered, within less than three years last past, sufficient facts and information to enable her to commence this action for declaratory relief, accounting, damages, and imposition of constructive and/or resulting trust, and plaintiff could not, prior to that time, through reasonable diligence, have discovered the facts or information necessary to commence this action.

19. Plaintiff is informed and believes and based thereon alleges that defendants Berlin, as widow of Williams Sr., and Williams Jr., as alleged son of Williams Sr., claim to be the only persons in whom the relevant United States Copyright Acts vest the right to renew the copyrights to all musical compositions which were written in whole or in part by Williams Sr. Plaintiff is informed and believes and based theron [sic] alleges that claims of copyright registration have been recorded with the Register of Copyrights in the names of Berlin and Williams Jr. and/or their respective transferees with respect to the renewal copyrights to all musical compositions which were written in whole or in part by Williams Sr.

20. Plaintiff is informed and believes and based thereon alleges that defendants Aberbach, Chappell, ARO Music, and MOM Music claim to have received assignments, or otherwise claim to be the successors in interest to those who have received the assignments, from Berlin

and Williams Jr. of all the renewal copyrights to all musical compositions which were written in whole or in part by Williams Sr. Plaintiff is informed and believes that Chappell, Aberbach, ARO Music and MOM Music, or their predecessors in interest, have recorded such assignments with the Register of Copyrights.

21. Plaintiff has notified defendants, and each of them, that she is the natural daughter of Williams Sr., and the equitable owner of no less than an undivided 33 1/3% interest in all renewal copyrights to all musical compositions written in whole or in part by Williams Sr. renewed under either the Copyright Act of 1909 or the Copyright Act of 1976. These renewal copyrights include, but are not limited to, the musical compositions identified in Exhibit 1 attached hereto and fully incorporated herein by this reference.

22. All defendants deny the claims of plaintiff as set forth in paragraph 21 hereinabove and plaintiff is informed and believes that defendants, rely, in part, in their denial, on an order of the Circuit Court of Montgomery County, Alabama, Case No. 27960 entitled *In the Matter of the Guardianship Estate of Randall Hank Williams, a Minor.* A true and correct copy of that order is attached hereto and fully incorporated herein as Exhibit 2. Plaintiff is informed and believes that defendants, and each of them; contend that such order purports to prohibit plaintiff from obtaining any interest in and to the Williams Sr. copyrights under the federal copyright law.

23. To the extent Exhibit 2 purports to in any manner govern the renewal rights of plaintiff in the musical compositions written in whole or in part by Williams Sr.,

it is, and has been since the day it was entered, a legal nullity without any force or effect because, among other reasons: (1) The Circuit Court of Montgomery Alabama did not have subject matter jurisdiction to determine whether plaintiff had any rights, whether vested or contingent, to the renewal rights to the United States copyrights to the musical compositions written in whole or in part by Williams Sr.; (2) Plaintiff was at the time of such hearing a 15 year old minor, and did not receive proper notice, and was not properly or competently represented in connection with the proceedings which preceded the entry of such order or in connection with the subsequent proceedings with respect to such order since, among other things, no appeal was taken from that order even though grounds for appeal clearly existed; (3) The purported determination of plaintiff's rights under the Copyright Act, whether vested or contingent, were entirely unnecessary to the issues which were properly submitted to the court, i.e., whether or not a contract previously executed in favor of defendant ARO Music's predecessors-in-interest was valid and binding, and such order therefore has no *collateral estoppel* or *res judicata* effect on plaintiff; (4) The copyright law has been specifically amended by the Copyright Revision Act of 1976, effective as of January 1, 1978, to provide that plaintiff, as the natural daughter of Williams Sr., is entitled to an undivided ownership interest in and to the renewal copyrights which include, but are not limited to, those musical compositions identified in Exhibit 1; and (5) Exhibit 2 was entered in furtherance of an unlawful conspiracy perpetrated on plaintiff by defendants Rose, Acuff, Fred Rose,

Milene, ARO Music and MOM Music, as more specifically alleged herein in plaintiff's second claim for relief.

24. Plaintiff contends that:

(a) Plaintiff is the natural daughter of Williams Sr.;

(b) Plaintiff is, and has at all times been, the equitable owner of and is entitled to not less than an undivided 33 1/3% interest in the renewal copyrights to all musical compositions written in whole or in part by Williams Sr. renewed pursuant to the provisions of the Copyright Act of 1909;

(c) Plaintiff is, and has at all times been, the equitable owner of and is entitled to not less than an undivided 33 1/3% interest in all renewal copyrights to all musical compositions written in whole or in part by Williams Sr. renewed pursuant to the provisions of the Copyright Act of 1976;

(d) Plaintiff is entitled to her appropriate ownership interest in all foreign copyrights of all musical compositions written in whole or in part by Williams Sr. renewed pursuant to the provisions of the Copyright Act of either 1909 or 1976;

(e) Plaintiff is entitled to receive from defendants, and each of them, an immediate accounting of all royalties, revenue, income, monies, and other consideration, derived directly or indirectly from the exploitation, whether domestically or foreign, of all musical compositions written in whole or in part by Williams Sr.; that she should be forthwith paid all monies or other compensation owed to her pursuant to her undivided ownership interest in said Williams Sr. compositions; and that she is

entitled to a continuing accounting for the full term of renewal of copyrights throughout the world and to her appropriate share of said copyrights and all such monies and compensation;

(f) The order attached hereto as Exhibit 2 is null and void to the extent it purports to affect or impact any of the rights of plaintiff whatsoever and/or to the extent it purports to affect or impact any of plaintiff's interests in the renewal copyrights to the musical compositions written in whole or in part by Williams Sr. renewed pursuant to the provisions of either the Copyright Act of 1909 or the Copyright Act of 1976;

(g) Plaintiff be awarded her proportionate entitlement to all copyrights to which she is entitled as the natural daughter of Williams Sr.; and

(h) Defendants be ordered to convey to plaintiff legal title to her proportionate share of the renewal rights, or other rights, to the United States copyrights in and to the musical compositions written in whole or in part by Williams Sr., and that defendants be ordered to execute all documents necessary to effectuate the recordation and/or registration in the United States Copyright Office, of plaintiff's interests in such renewal or other copyrights.

25. Defendants, and each of them, dispute plaintiff's contentions and contend that plaintiff has no equitable, legal or other ownership interest in the renewal copyrights in any musical compositions written in whole or in part by Williams Sr., including, but not limited to, those alleged hereinabove at paragraph 21, that the order

attached hereto as Exhibit 2 is valid and binding as to plaintiff, and that no accounting need be rendered.

26. An actual controversy therefore exists between plaintiff and defendants, and each of them, pursuant to 28 U.S.C. §2201, and plaintiff desires a judicial determination of her rights and, in particular, a declaration that:

(a) Plaintiff is the natural daughter of Williams Sr.; (b) Plaintiff is and has been the true legal owner of her interest in the renewal copyrights to all musical compositions written in whole or in part by Williams Sr. since the commencement of the respective United States copyright renewal terms, and is entitled to not less than an undivided 33 1/3% interest in the renewal copyrights to all musical compositions written in whole or in part by Williams Sr. renewed pursuant to the provisions of the Copyright Act of 1909;

(c) Plaintiff is and has been the true legal owner of her interest in the renewal copyrights to all musical compositions written in whole or in part by Williams Sr. since the commencement of the respective United States copyright renewal terms, and is entitled to not less than an undivided 33 1/3% interest in all renewal copyrights to all musical compositions written in whole or in part by Williams Sr. renewed pursuant to the provisions of the Copyright Act of 1976;

(d) Plaintiff is entitled to her appropriate ownership interest in all foreign exploitation of all musical compositions written in whole or in part by Williams Sr. renewed pursuant to the provisions of the Copyright Act of either 1909 or 1976;

(e) Defendants, and each of them, render an immediate accounting of all royalties, revenue, income, monies and other consideration, derived directly or indirectly, whether domestically or foreign, from the exploitation of all musical compositions written in whole or in part by Williams Sr., and that plaintiff be forthwith paid all monies or other compensation owed to her pursuant to her undivided ownership interest in said Williams Sr. compositions and to continue to account to plaintiff with respect to said monies and compensation;

(f) The order attached hereto as Exhibit 2 is null and void to the extent it purports to affect or impact any of the rights of plaintiff whatsoever and/or to the extent it purports to affect or impact any of plaintiff's interests in the renewal copyrights to the musical compositions written in whole or in part by Williams Sr. renewed pursuant to the provisions of either the Copyright Act of 1909 or the Copyright Act of 1976;

(g) Plaintiff be awarded her proportionate entitlement to all copyrights to which she is entitled as the natural daughter of Williams Sr.; and

(h) Defendants convey to plaintiff legal title to her proportionate share of the renewal rights, or other rights, to the United States copyrights in and to the musical compositions written in whole or in part by Williams Sr., and that defendants be ordered to execute all documents necessary to effectuate the recordation and/or registration in the United States Copyright Office, of plaintiff's interests in such renewal or other copyrights.

27. Plaintiff has further been damaged as a result of the acts of defendants, and each of them, in an amount in

excess of $10,000.00, but not yet ascertainable. Plaintiff prays for leave to amend this Complaint at the time of trial to set forth the amount of the damages suffered according to proof.

28. Plaintiff has no adequate remedy at law and prays that a constructive or resulting trust be imposed and all money or other consideration received from her equitable interest in the foregoing renewal copyrights to the Williams Sr. musical compositions be paid into court and held in trust pending the determination of this action in order to avoid the perpetration of a fraud upon her and the unjust enrichment of defendants, and each of them.

29. 17 U.S.C. §505 states as follows:

> "In any civil action under this title, the court in its discretion may allow the recovery of full costs or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs."

Plaintiff has had to retain the services of an attorney to prosecute this action and prays that she be given leave to amend this Complaint to set forth the full amount of fees incurred at the trial or the conclusion of this action.

SECOND CLAIM FOR RELIEF AGAINST ARO MUSIC, MOM MUSIC, ROSE, ACUFF, FRED ROSE, AND MILENE FOR CONSPIRACY TO DEFRAUD AND BREACH FIDUCIARY DUTY

30. Plaintiff incorporates herein by reference each and every allegation contained in paragraphs 1 through

16 and 18 through 20 of the Third Amended Complaint as though fully set forth herein.

31. Robert B. Stewart (hereinafter "Stewart") was at all times herein relevant an attorney licensed to practice law in the State of Alabama and from in or about 1953 through in or about August, 1975, he acted as attorney for the estate of Hiriam "Hank" Williams (hereinafter "the estate").

32. The estate was initially administered by Williams Sr.'s mother, Lillian Williams Stone, until her death in or about 1955. At that time, the administratrix's responsibilities were purportedly assumed by her daughter, and Williams Sr.'s sister, Irene Smith (hereinafter "Smith"). Smith continued to act as administratrix of the estate until in or about 1969 when she resigned as administratrix because she was convicted for cocaine smuggling in Laredo, Texas. At that time, Stewart assumed responsibility as administrator of the estate and continued as attorney for the estate.

33. Smith and Stewart knew of plaintiff since her birth on January 6, 1953 and knew, since that time, that she had claims and rights as the natural child of Williams Sr. While acting in their respective capacities as administrator and/or attorney for the estate, Smith and Stewart had a confidential relationship with plaintiff; they were charged with the highest degree of fiduciary duty to plaintiff; they were obligated to fully advise her or her appropriate representatives of all material facts and theories which could affect her claims, rights and interests arising from the fact that she is the natural daughter of Williams Sr.; they were required to to take whatever

measures were necessary to protect her interest; and they were prohibited from placing the interest of another potential heir over her interest.

34. At all times alleged herein, defendants ARO Music, MOM Music, Rose, Acuff, Fred Rose and Milene (hereinafter "Co-conspirator Defendants"), knew or had reason to know that plaintiff was the natural daughter of Williams Sr. and Williams Jr.'s half-sister, that Smith and Stewart were the administrators and/or the attorney for the estate, that Smith and Stewart had a confidential and fiduciary relationship with plaintiff and that Smith and Stewart were charged with the highest degree of fiduciary duty to plaintiff.

35. Co-conspirator Defendants, Smith and Stewart knew, or had reason to know, that the Alabama state Court, in making determinations regarding the estate, would depend in great measure on the integrity and thoroughness of Stewart and would depend on the facts and issues presented to the Court by Stewart.

36. Commencing at some time in at least 1960 or 1961, and continuing thereafter as more specifically alleged hereinbelow, and with full knowledge of the facts alleged hereinabove at paragraphs 31, 32, 33 and 35, Co-conspirator Defendants, Smith and Stewart knowingly and willfully conspired and agreed among themselves, and each of them, to unlawfully exploit and misuse Stewart and Smith's fiduciary relationship with plaintiff to (1) prevent plaintiff from perfecting her interest in the Williams Sr. renewal copyrights and (2) to permit Co-conspirator Defendants to misappropriate plaintiff's interest

in the Williams Sr. renewal copyrights for their sole and exclusive benefit.

37. The specific overt acts which constitute the conspiracy alleged hereinabove include, but are not limited to, the following:

(a) Stewart and Co-conspirator Defendants' agent met (i) in New York City sometime in between May 10, 1960 and February 16, 1962; (ii) in San Francisco, California sometime between July 24, 1962 and September, 1962, and (iii) in Nashville, Tennessee sometime in September, October or November, 1962, all in furtherance of the conspiracy alleged hereinabove.

(b) Co-conspirator Defendants' agents and Stewart communicated in writing and provided each other documents and information in furtherance of the conspiracy on or about February 8, 1960, February 18, 1960, March 16, 1960, February 16, 1962, February 28, 1962, April 27, 1962, May 1, 1962, and July 5, 1962.

(c) The foregoing written communications and meetings were, in whole or in part, to create a scheme to enable Co-conspirator Defendants to permanently divest plaintiff of her interest in the Williams Sr. renewal copyrights through a "token" or "nominal" payment without her knowledge and/or to conceal and suppress plaintiff's existence and interest in the Williams Sr. renewal copyrights from plaintiff and from the Alabama state Court.

(d) Co-conspirator Defendants, Smith and Stewart elected to conceal plaintiff's existence and her interest in the Williams Sr. renewal copyrights from plaintiff and the Alabama state Court. This concealment and suppression

of material facts from the Alabama state Court continued until in or about March, 1967 when Williams Jr. and his mother, Audrey Mae Williams (hereinafter "Audrey"), filed an action against Smith to terminate the estate and to rescind a contract executed by Smith in or about 1963 which purportedly sold Williams Jr.'s interest in the Williams Sr. renewal copyrights to Co-conspirator Defendants. This action filed by Audrey and Williams Jr. disclosed to the Alabama state Court, for the first time, the existence of plaintiff and her interest in, in part, the Williams Sr. renewal copyrights.

(e) In furtherance of the conspiracy, Co-conspirator Defendants, Stewart and Smith created a scheme to prematurely divest plaintiff of her rights in the Williams Sr. renewal copyrights (i) before she reached the age of majority and could learn of and perfect her interest in the Williams Sr. renewal copyrights, and (ii) before pending amendments to the United States copyright laws specifically granting rights to illegitimates would be enacted, the pendancy of which was expressly known by Co-conspirator Defendants, Stewart and Smith.

(f) In furtherance of the conspiracy, Smith, Stewart and Co-conspirator Defendants arranged, in or about May, 1967 (i) for the appointment of the guardian ad litem of their choice to purportedly represent plaintiff's interest in the Williams Sr. renewal copyrights, (ii) for her interest to purportedly be decided in state, not federal court, despite the fact that they knew that the federal courts had exclusive jurisdiction and expertise over the subject matter, and (iii) to have plaintiff's interest in the

Williams Sr. renewal copyrights determined in a proceeding initiated by Williams Jr. and Audrey which was entirely unrelated to plaintiff's contingent interest in the Williams Sr. renewal copyrights.

(g) As a result of the manipulation and conspiracy alleged hereinabove, the Alabama state Court entered, on or about January 30, 1968, the order attached hereto as Exhibit 2 which purports to affect plaintiff's rights.

(h) Co-conspirator Defendants, Smith and Stewart knew, or had reason to believe, at all times relevant hereto, that, under existing Alabama law, plaintiff would be entitled, within one year after her twenty-first birthday, on January 6, 1974, to file appropriate legal action to set aside the order attached hereto as Exhibit 2, or to set aside any order entered before her twenty-first birthday which purported to affect her rights.

(i) Stewart and Co-conspirator Defendants' agent communicated in writing, in part, on November 1, 1973, April 4, 1974, and April 11, 1974 to suppress and conceal relevant facts and information from plaintiff, both before and after she reached the age of majority. The estate was closed in or about August, 1975 and Stewart, in furtherance of the conspiracy, and contrary to his fiduciary obligations, failed to advise plaintiff or any of her representatives of any pertinent facts, theories, or of any rights or claims she may have either before or after she reached the age of majority.

38. Co-conspirator Defendants ARO Music, MOM Music, Acuff, Rose, Milene and Fred Rose, did the acts and things herein alleged in furtherance of the conspiracy

and above-alleged agreement between said Co-conspirator Defendants on the one hand, and Stewart and Smith on the other hand.

39. As a proximate result of the wrongful acts herein alleged, plaintiff has not received any income from her interest in the Hank Williams, Sr. renewal copyrights and has, as a result thereof, been damaged in a sum that is not yet ascertainable but in excess of $10,000.00.

40. As a proximate result of the wrongful acts herein alleged, plaintiff has been generally damaged in a sum that is not yet ascertainable, but in excess of $10,000.00.

41. The acts of Co-conspirator Defendants Acuff, Rose, Fred Rose, Milene, ARO Music and MOM Music alleged herein, were done knowingly, maliciously, and oppressively, and plaintiff is therefore entitled to punitive and/or exemplary damages in the sum of at least $10,000,000.00.

WHEREFORE, plaintiff prays for judgment as follows:

ON THE FIRST CLAIM FOR RELIEF

1. For declaratory judgment that:

(a) Plaintiff is the natural daughter of Williams Sr.;

(b) Plaintiff is and has been the true legal owner of her interest in the renewal copyrights to all musical compositions written in whole or in part by Williams Sr. since the commencement of the respective United States copyright renewal terms, and is entitled to not less than

an undivided 33 1/3% interest in the renewal copyrights to all musical compositions written in whole or in part by Williams Sr. and renewed pursuant to the provisions of the Copyright Act of 1909;

(c) Plaintiff is and has been the true legal owner of her interest in the renewal copyrights to all musical compositions written in whole or in part by Williams Sr. since the commencement of the respective United States copyright renewal terms, and is entitled to not less than an undivided 33 1/3% interest in the renewal copyrights to all musical compositions written in whole or in part by Williams Sr. renewed pursuant to the provisions of the Copyright Act of 1976;

(d) Plaintiff is entitled to her appropriate ownership interest in all foreign exploitation of all musical compositions written in whole or in part by Williams Sr. renewed pursuant to the provisions of the Copyright Act of either 1909 or 1976;

(e) Defendants, and each of them, render an immediate accounting of all royalties, revenue, income, monies, and other consideration, derived directly or indirectly, whether domestically or foreign, from the exploitation of all musical compositions written in whole or in part by Williams Sr. and that plaintiff be forthwith paid all monies or other compensation owed to her pursuant to her undivided ownership interest in said Williams Sr. compositions and continue to so account to plaintiff;

(f) The order attached hereto as Exhibit 2 is null and void to the extent it purports to affect or impact any of the rights of plaintiff whatsoever and/or to the extent it purports to affect or impact any of plaintiff's interests

in the renewal copyrights to the musical compositions written in whole or in part by Williams Sr. renewed pursuant to the provisions of either the Copyright Act of 1909 or the Copyright Act of 1976;

(g) Plaintiff be awarded her proportionate entitlement to all copyrights to which she is entitled as the natural daughter of Williams Sr.; and

(h) Defendants convey to plaintiff legal title to her proportionate share of the renewal rights, or other rights, to the United States copyrights in and to the musical compositions written in whole or in part by Williams Sr., and that defendants be ordered to execute all documents necessary to effectuate the recordation and/or registration in the United States Copyright Office, of plaintiff's interests in such renewal or other copyrights.

2. For damages according to proof at trial;

3. For the imposition of a constructive or resulting trust on all monies derived by defendants from plaintiff's equitable interest in all renewal copyrights to all musical compositions written in whole or in part by Williams Sr.;

ON THE SECOND CLAIM FOR RELIEF

4. For damages according to proof at trial;

5. For exemplary damages according to proof at trial but in the sum of at least $10,000,000.00;

ON ALL CLAIMS FOR RELIEF

4. For reasonable attorneys' fees;

5. For costs of suit herein incurred; and

6. For such other and further relief as this court deems just and proper.

Dated: Beverly Hills, California

September 26, 1986

RUDIN, RICHMAN & APPEL
A Professional Corporation
VINCENT H. CHIEFFO
JAMES A. GOODMAN

By: /s/ James Goodman
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Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury.

Dated: Beverly Hills, California

September 26, 1986

G-1.23

RUDIN, RICHMAN & APPEL
A Professional Corporation
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JAMES A. GOODMAN

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APPENDIX G-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CATHY YVONNE STONE, an individual, Plaintiff, -against- HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a division of CHAPPELL & CO., INC., a Delaware corporation, ACUFF-ROSE-OPRYLAND MUSIC, INC., a Tennessee corporation, WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc., FRED ROSE MUSIC, INC., a Tennessee corporation, and MILENE MUSIC, INC., a Tennesse [sic] corporation, Defendants.	Civil Action No. 85 Civ. 7133 (JFK) *NOTICE OF MOTION*

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Alan L. Shulman and Defendants' Memorandum of Law, the undersigned attorneys for defendants HANK WILLIAMS, JR., WESLEY H. ROSE, ROY ACUFF, FRED ROSE MUSIC, INC. and MILENE MUSIC, INC. will move

this Court at Room 35 in the United States Courthouse on the 16th day of December, 1985 at 9:30 A.M. in the forenoon of that day or as soon thereafter as counsel can be heard for an order of this Court staying all proceedings herein on the grounds that the issues in this action are the same and can be fully litigated in Case No. CV-85-1316 presently pending in the Circuit Court for Montgomery County, Alabama which was commenced prior to this case and that such issues are based on state law in which the State of Alabama has a predominant interest.

Dated: New York, New York
December 3, 1985

Yours, etc.

SILVERMAN & SHULMAN, P.C.

By /s/ Alan L. Shulman
Attorneys for Defendants
Hank Williams, Jr., Wesley H. Rose, Roy Acuff, Fred Rose Music, Inc. and Milene Music, Inc.
136 East 57th Street
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TO: COBLENCE & WARNER
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Acuff-Rose-Opryland Music, Inc.
600 Madison Avenue
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APPENDIX G-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CATHY VYONNE STONE, an individual, Plaintiff, vs. HANK WILLIAMS, JR. et al., Defendants.	85 Civil 7133

New York, N. Y.
January 17, 1986
4:30 p.m.

Before:

HON. JOHN F. KEENAN,

District Judge

Appearances:

COBLENCE & WARNER, Esqs.,
Attorneys for Plaintiff
MARJORIE M. SMITH, Esq., of counsel

SILVERMAN & SHULMAN, P.C.
Attorneys for Wiliams [sic], Jr., Acuff, Rose,
Fred Rose Music and Milene
ALAN L. SHULMAN, Esq., of counsel

BERGER & STEINGUT, Esqs.
Attorneys for Acuff-Rose-Opryland Music Inc.
ROBERT A. WEINER, Esq., of counsel

THOMAS R. LEVY, Esq.,
Attorney for additional defendants

(p. 2) THE COURT: Is there anything anybody wants to say more about the motion?

Although I received the papers yesterday, knowing this was on, I was able to read the papers on your motion, the motion to stay the action until it is resolved in Alabama.

Is there anything more you want to add, because I want to hear what the lawyers have to say.

MS. SMITH: Your Honor, first, we were told that your Honor would not be hearing oral argument, otherwise, California counsel, which is lead counsel, would be here, and if there is an opportunity for oral argument they will come in.

They did advise me they would like an opportunity to submit a very brief sur-reply.

THE COURT: I don't want a sur-reply. I don't take sur-replies. I take motions and the answers. If I get a sur-reply, what comes after a sur-reply? It becomes like a tennis match, where they are playing from the base line rather than going to net, and if you play tennis you understand what I mean. It results in an endless series of things going back and forth. Ultimately everybody has to be finished.

MS. SMITH: Your Honor, the reason we are asking that opportunity is that I did communicate with your (p. 3) chambers and I was told there would be no oral argument, and counsel didn't come in.

The reason they would like to submit a sur-reply is that my papers narrow the issue beyond what the original papers did.

THE COURT: There is no need for a sur-reply.

MR. SHULMAN: I am the attorney for Williams, Acuff and Rose, also Fred Rose Music and Milene, and I represent the moving defendants.

I don't have anything to add to our responsive papers and original motion papers, but I will be available for answering questions if your Honor has any.

THE COURT: Do you have anything else?

MS. SMITH: Your Honor, not specifically on the motion, but the other request from California counsel is, if your Honor would just note that they are prepared to proceed very expeditiously with discovery in this case and believe that there is not a great deal of discovery required, and if your Honor were inclined to set a discovery schedule they would be very happy if discovery cutoff was some time in the summer, with a prospective trial in the fall.

MR. SHULMAN: We haven't even addressed discovery, believing it is being stayed pending resolution of the motion before the Court.

At such time I really would want to examine it (p. 4) carefully, because I am not really sure. I think probably before we get to discovery there would be some jurisdictional motions made by the defendants, assuming there were no stay.

THE COURT: When you say jurisdictional motions, do you mean a change of venue motion?

MR. SHULMAN: No. Subject matter, persona.

THE COURT: Didn't I say subject matter, too?

MR. SHULMAN: Yes. I didn't want to raise that, but I am not certain there is not a defect in the subject matter jurisdiction at this point.

THE COURT: Well, wait a minute now. Doesn't in great measure the motion to stay turn on whether or not this Court has jurisdiction? If this Court does not have jurisdiction, what are we playing around with? If I don't have jurisdiction, what am I doing?

I am ready to rule on the motion. As I said, I have read the papers.

I feel that only this Court has jurisdiction over the question of Stone's rights under the copyright law. Even if it must eventually apply Alabama law to the question, this Court alone can determine the plaintiff's rights with respect to the copyright claim.

A resolution of the paternity issue by the Alabama court will not conclude the proceedings pending (p. 5) before this Court. Thus, the Alabama State Court action is not a "parallel" action, nor would its resolution preclude the need for further steps in this federal action. The copyright claims would be required to proceed in this forum in any event, given this Court's virtually unflagging obligation to exercise the jurisdiction given it, citing Moses H. Cone Hospital v. Mercury Construction Corp., 461 US 1, at page 15, decided in 1982. In that case the Supreme Court quoted Mc Clellan v. Carland, 217 US 268, citing at page 282, decided in 1910. Judicial economy will not be served by a stay. I would refer you to Colorado

River Water Conservation District v. United States, 424 US 800, decided in 1976.

None of the factors relating to the traditional grounds for abstention by a federal court, such as the potential mooting of a constitutional issue, concerns relating to federal-state comity or the existence of related criminal procedures is present in this case. No constitutional issues have been raised, and the instant litigation is wholly civil in character.

As to the comity issue, I do not find that there are any policy problems of substantial public input whose importance transcends the result in the case at bar, citing again Colorado River at page 814.

This Court's order in the Stone case will have (p. 6) no impact on other state probate or domestic cases in Alabama.

Thus, given the exclusive federal jurisdiction over copyright cases, the failure of defendants to prove the exceptional circumstances constituting grounds for dismissing or staying a federal court proceeding under the doctrine of the Cone case and the inapplicability of the traditional abstention doctrines, this Court declines to grant defendants' motion for a stay.

The stay of discovery now in place pursuant to this Court's December 20, 1985 order is lifted, and the case should go into discovery immediately.

Now, I didn't know anything about jurisdictional motions. I dictated that earlier this afternoon.

What is this about the jurisdiction?

MR. SHULMAN: I am not prepared to argue at this point. I am somewhat taken aback, so I and the other defendants would want to regroup.

THE COURT: You will want to order a copy of the minutes, but I would set a discovery cut-off date of June 20th, and I would suggest another conference in this matter on June 26th, at ten o'clock.

If you are going to make any motions, you had best read the law journal and note my pre-motion calendar.

APPENDIX G-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CATHY YVONNE STONE, an individual, Plaintiff, vs. HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS, BERLIN, CHAPPELL MUSIC COMPANY, a division of CHAPPELL & CO., INC., a Delaware corporation, ABERBACH ENTERPRISES, LTD., a New York corporation, ACUFF-ROSE-OPRYLAND MUSIC, INC., a Tennessee corporation, MILENE-OPRYLAND MUSIC, INC., a Tennessee corporation, WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc., FRED ROSE MUSIC, INC., a Tennessee corporation, and MILENE MUSIC, INC., a Tennessee corporation, Defendants.	CASE NO. 85 Civ. 7133 (JFK) AFFIDAVIT OF JAMES A. GOODMAN IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

AFFIDAVIT OF JAMES A. GOODMAN

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

JAMES A. GOODMAN, being duly sworn, deposes and says:

1. I am a member of the State Bar of California and a member of the law firm of Rudin, Richman & Appel who, in association with the Law Firm of Coblence & Warner, and the Law Offices of F. Keith Adkinson, represents plaintiff Cathy Yvonne Stone (hereinafter "plaintiff") in connection with the foregoing matter. I have personal knowledge of the facts stated herein except for those stated upon information or belief or those stated to be my opinion, and as to those I believe them to be true. If called upon to do so I could and would competently testify thereto.

2. I am the attorney who has been principally responsible for representing plaintiff in this action. Extensive discovery has been conducted by the parties. I am informed and believe that over 50 persons or entities have been deposed. Depositions have been conducted in California, New York, Alabama, Tennessee, Maryland and Texas. The parties have served interrogatories and requests for admissions. Thousands of documents documents [sic] have been produced pursuant to document requests and third party subpoena. Even though Hiriam "Hank" Williams (hereinafter "Hank Williams" or "Hank") died on January 1, 1953, plaintiff has been able to discover substantial uncontroverted evidence to prove that Hank Williams is her natural father. That evidence, in part, is attached to this Affidavit and identified herein.

3. Attached hereto as *Exhibit 1* is a true and correct copy of a report of Montgomery Department of Public Welfare (hereinafter "Montgomery Department") to the

probate court of Montgomery County dated September 16, 1953. This document was produced by the Montgomery Department's successor-in-interest, the Alabama Department of Human Resources ("Department of Human Resources") pursuant to a subpoena in this action. The document sets forth, in part, the conclusion of the Montgomery Department, based on its 1953 investigation, that Hank Williams supported Bobbie Jett (hereinafter "Bobbie") during her pregnancy, that Bobbie consented to the adoption because she is 'keeping the baby in the family circle' and that Bobbie was "unwilling to consider other adoptive plans for the child".

4. Attached hereto as *Exhibit 2* is a true and correct copy of a contract entered into between Hank Williams and Bobbie dated October 15, 1952 (hereinafter sometimes referred to as the "October 15, 1952 contract), wherein Hank Williams and Bobbie agreed, in part, that Hank would take custody of and support Bobbie's baby, plaintiff herein.

5. All parties in this action have admitted that the October 15, 1952 contract is an authentic document, signed by Bobbie and Hank Williams. All parties to the action have also admitted that plaintiff is in fact the child to be born by Bobbie referred to in the October 15, 1952 contract. The parties have also admitted that in December 1954, Lillian Stone, Hank Williams's mother, (hereinafter "Mrs. Stone") adopted plaintiff. Defendants' responses to plaintiff's Requests for Admissions whereby defendants admit the foregoing facts to be true for the purposes of this action are collectively attached hereto as *Exhibit 3*.

6. Attached hereto as *Exhibit 4* are true and correct copies of the documents produced from the files of the Montgomery County Courthouse which relate to Hank Williams's effort to legitimate defendant Randall Hank Williams (hereinafter "Williams Jr.").

7. Attached hereto as *Exhibit 5* is a twenty-eight page daily journal compiled by Montgomery Department from in or about January 1953 through April 1955 in connection with Mrs. Stone's adoption of of [sic] plaintiff. Plaintiff has bracketed relevant portions of the document.

8. Attached hereto as *Exhibit 6* is a receipt dated October 15, 1952 from Dr. E.M. Stokes reflecting receipt of $100 by Mrs. W. W. Stone on the account of Bobbie Jett. October 15, 1952 is, of course, the same date that Bobbie and Hank Williams executed the October 15, 1952 contract. Dr. E. M. Stokes is the doctor designated by Hank Williams and Bobbie in the October 15, 1952 contract would deliver Bobbie's baby. *Exhibit 6* was produced from the files of Jones, Murray & Stewart, a Montgomery, Alabama law firm, (hereinafter "JM&S") pursuant to subpoena in this action. Robert Stewart (hereinafter "Stewart"), the person who drafted the October 15, 1952 contract, and witnessed its execution, was a principal of JM&S. Stewart is deceased.

9. Attached hereto as *Exhibit 7* is a June 15, 1964 letter from Robert Stewart of JM&S to Irene W. Smith (hereinafter "Smith"), Hank Williams's sister. The letter makes reference to the receipt received from Dr. Stokes.

10. Attached hereto as *Exhibit 8* is a copy of an unexecuted letter from Hank Williams to St. Margaret's Hospital dated October 15, 1952 stating, in part, that he

will be "responsible for any hospital bills incurred by Bobbie W. Jett in connection with the birth of her child to be born sometime during December, 1952 or January, 1953". This document was produced from the files of JM&S pursuant to subpoena in this action.

11. Attached hereto as *Exhibit 9* is a copy of an unexecuted October 15, 1952 letter from Hank Williams to Dr. E. M. Stokes which states "I will be responsible for any bills incurred by Bobbie W. Jett for your services in caring for her before her child is born and for delivering the child and caring for her afterwards." This document was produced from the files of JM&S pursuant to subpoena in this action.

12. Attached hereto as *Exhibit 10* is a press released [sic] produced by defendant Acuff-Rose-Opryland Music Inc. (hereinafter "ARO Music") in this action. The press release states "Faron Joins the Grand Ole Opry on June 1st". This date is relevant because defendant Williams-Berlin testified that she met Hank Williams on or about the day Faron Young joined the Grand Ole Opry. (See Williams-Berlin testimony attached hereto as *Exhibit 42*.)

13. Attached hereto as *Exhibit 11* is a probate court order dated August 18, 1967. The Order describes the events that took place in Robert Stewart's office on October 15, 1952 when Hank Williams, Bobbie and Mrs. Stone appeared at Stewart's office for the drafting and execution of the October 15, 1952 contract.

14. Attached hereto as *Exhibit 12* is a February 10, 1953 handwritten letter from Bobbie to "Mrs. Williams", Hank Williams's mother wherein Bobbie states "I will come down there just as soon as I can and sign the

papers. Yes I want to do the right thing and am going to. You and I made a bargain. I will stick to mine".

15. Attached hereto as *Exhibit 13* is a February 12, 1953 letter from the Montgomery Department to the Bureau of Field Services State Department of Public Welfare, Nashville, Tennessee (hereinafter "Nashville Department"). In the letter, the Montgomery Department states, in part, that "Mrs. Stone told us that Mr. Williams had acknowledged paternity of this child prior to his death and she brought with her a letter of permission signed by Mr. Williams, saying that he would be responsible for the hospital bills of Miss Jett".

16. Attached hereto as *Exhibit 14* is a March 27, 1953 letter from the Nashville Department to the Montgomery Department. This document was produced by the Department of Human Resources pursuant to a subpoena in this action. In the letter, the Nashville Department field worker states, in part, that she interviewed Miss Jett and "[Miss Jett] will surrender the baby for adoption only with the assurance the baby is to be adopted by Mrs. Stone. Miss Jett expressed the idea that the care of the baby will in some measure compensate Mrs. Stone for the loss of her son. Miss Jett rationalizes by saying 'I am keeping the baby in the family circle'."

17. Attached hereto as *Exhibit 15* is a June 22, 1953 letter from the Nashville Department to the Montgomery Department. This document was produced by the Department of Human Resources pursuant to a subpoena in this action. The letter state [sic] that the Nashville Department asked Miss Jett about placing the "baby with younger parents who had proven to the Agency they could offer

the child a normal, happy home life," but "Miss Jett was unwilling to consider any plan except for Mrs. Stone to adopt the baby."

18. Attached hereto as *Exhibit 16* is a August 24, 1953 letter from the Montgomery Department to the Nashville Department This document was produced by the Department of Human Resources pursuant to a subpoena in this action. In the letter, the Montgomery Department states "we are also asking for a statement from Miss Jett as to whom she says is the father of her child. Although the alleged grandmother of the child has told us on several occasions that her son is the father of this child, we have no verifying statement from the mother."

19. Attached hereto as *Exhibit 17* is a September 1, 1953 letter from the Nashville Department to the Montgomery Department This document was produced by the Department of Human Resources pursuant to a subpoena in this action.

20. Attached hereto as *Exhibit 18* is a handwritten note signed by Bobbie Jett stating that Hank Williams is the father of her child dated August 31, 1953. This document was produced by the Department of Human Resources pursuant to a subpoena in this action. This document was written by Bobbie Jett pursuant to the request set forth in *Exhibit 16* and was provided to the Montgomery Department by cover of letter attached hereto as *Exhibit 17*. The note states "Hank Williams is the father of the baby Mrs. W. W. Stone of Montgomery, Ala – now has," and was signed by Bobbie Jett on August 31, 1953.

21. Attached hereto as *Exhibit 19* is an August 30, 1954 letter from the Montgomery Department to Honorable David E. Dunn, of the Montgomery County Probate Court. In the letter to the court, the Montgomery Department states "We feel that the child will continue to live in the home with her grandmother even though the adoption was not granted final". This document was produced by the Department of Human Resources pursuant to a subpoena in this action.

22. Attached as *Exhibit 20* is a document dated June 18, 1953. It is a consent by Bobbie Jett to the adoption of her child by Mrs. Stone. As set forth in *Exhibit 5*, Mrs. Stone went to Nashville, Tennessee to obtain this consent.

23. Attached hereto as *Exhibit 21* is a true and correct copy of the letter dated September 23, 1953 from the Norfolk County Department of Public Welfare ("Norfolk Department") to the Montgomery Department setting forth the Norfolk Department's investigation of Hank Williams's sister, Irene Smith hereinafter ("Smith"). The letter states "Mrs. Smith told us that her deceased brother is the natural father [of the baby Mrs. Stone wants to adopt]."

24. Attached hereto as *Exhibit 22* is a copy of the "Reply Brief of Drayton N. Hamilton, Guardian ad Litem" which was served on or about November 21, 1967 in connection with "In the Matter of the Estate of Hiriam "Hank" Williams in the Circuit Court of Montgomery County Alabama." In the brief, Hamilton, who is appointed guardian ad litem for plaintiff in the Montgomery litigation (see Hamilton Deposition testimony attached hereto as *Exhibit 49*) argues to the court that "neither brief

[of Williams Jr. or the administratrix (Smith)] responds to the proposition advanced by the guardian ad litem in the original brief that the Jett child is the daughter of Hank Hank [sic] Williams, deceased." This is consistent with Hamilton's testimony in this action that no evidence was introduced to prove that plaintiff was not the natural daughter of Hank Williams (See Hamilton Deposition testimony attached hereto as *Exhibit 49*). This document was produced by a Montgomery, Alabama law firm, Balch & Bingham, pursuant to subpoena in this action.

25. Attached hereto as *Exhibit 23* is a February 28, 1962 letter from Harold Orenstein, former counsel for defendants Wesley Rose and Roy Acuff, as trustees in liquidation for Milene Music, Inc. and Fred Rose Music, Inc. (hereinafter "Acuff-Rose") and Stewart, the attorney who drafted the October 15, 1952 contract. The second page of the document contains, right above the name, "Catherine Yvonne Stone", the handwritten notation "adopted daughter". This admission was written by Noel Silverman, who at that time was an attorney in the office of Harold Orenstein, principal counsel for Acuff-Rose. (See Harold Orenstein deposition testimony attached hereto as *Exhibit 50.*) Mr. Silverman is currently a principal in the law firm of Silverman, Shulman & Slotkin, counsel for defendants Acuff-Rose and Williams Jr. in this action.

26. Attached hereto as *Exhibit 24* is a true and correct copy of a July 5, 1962 letter from Stewart to Harold Orenstein which was produced by defendants in this action. The letter is in response to Mr. Orenstein's letter of February 28, 1962. (*Exhibit 23*) Mr. Stewart suggests several alternative means for depriving plaintiff of her

interest in the Hank Williams renewal copyrights. It is notable that Stewart, a person who witnessed the execution of the October 15, 1952 contract does not suggest that plaintiff may not be the daughter of Hank Williams, nor does he suggest that either he or Acuff-Rose prove that plaintiff is not the daughter of Hank Williams.

27. Attached hereto as *Exhibit 25* is a true and correct copy of a September 18, 1967 transcript of the Alabama Circuit Court proceedings relating to plaintiff in this action. This document was produced by Williams Jr. in this action. This transcript was reconstructed by the court reporter who was present at the hearing as more fully set forth in the last page of the Exhibit. The transcriptions of those proceedings do not indicate that counsel for Williams Jr. or Smith, the administratrix, introduced any evidence that plaintiff is not the natural daughter of Hank Williams.

28. Attached hereto as *Exhibit 26* is an April 15, 1974 letter from Richard H. Frank to Stewart. In the letter, Mr. Frank, who was then and now is counsel for Acuff-Rose, states "I am much afraid that if Baby Jett has personally come up with lawyer to get the money from Mrs. Stone, her ancestry may well be reasonably obvious to her, and further trouble may ensue."

29. Attached hereto as *Exhibits 27 A, B, C and D* are the following documents:

a. *Exhibit 27A* – "The People" section of the *Atlanta Constitution*, published on September 16, 1985 which contains pictures of Hank Williams and plaintiff reproduced therein. Plaintiff is attempting to secure a

duplicate of the original photo of Hank Williams to present to the court.

b. *Exhibit 27B and C* – Original photographs of plaintiff.

c. *Exhibit 27D* – A duplicate of an original photograph of Bobbie Jett, plaintiff's mother.

30. Attached hereto as Exhibit 28 is a true and correct copy of an Order entered by Judge Richard P. Emmett of the Montgomery County Circuit in 1967 with respect to plaintiff's interest in the Estate of Hank Williams. Judge Emmett ruled that the October 15, 1952 contract between Bobbie Jett and Hank Williams was not sufficient to legitimate plaintiff under then applicable Alabama law. The court did not reach the question of paternity and, in fact, Judge Emmett himself testified that he believed and still believes plaintiff to be Hank Williams's natural daughter. (See Judge Emmett testimony attached hereto as *Exhibit 48*.)

31. Attached hereto as *Exhibit 30 through 55* are true and correct copies of excerpts from the transcripts of depositions taken during the course of this litigation. The excerpts from the deposition transcripts are marked as follows:

Exhibit 30 – excerpts of the deposition of Donald Helms.

Exhibit 31 – excerpts of the deposition of Gerald Rivers.

Exhibit 32 – excerpts of the deposition of Ray Price.

Exhibit 33 – excerpts of the deposition of Willard Jett.

Exhibit 34 – excerpts of the deposition of Francis Broyles.

Exhibit 35 – excerpts of the deposition of Patsy Jett.

Exhibit 36 – excerpts of the deposition of Gene Jett Byrne.

Exhibit 37 – excerpts of the deposition of Marie Harvell.

Exhibit 38 – excerpts of the deposition of Connie Helton.

Exhibit 39 – excerpts of the deposition of Robert Helton.

Exhibit 40 – excerpts of the deposition of Neal McCormick.

Exhibit 41 – excerpts of the deposition of Peggy Venable.

Exhibit 42 – excerpts of the deposition of Billie Jean Horton Williams Berlin.

Exhibit 43 – excerpts of the deposition of Jean Davis.

Exhibit 44 – excerpts of the deposition of Owen Bradley.

Exhibit 45 – excerpts of the deposition of Robert McKinnon.

Exhibit 46 – excerpts of the deposition of Ada Kate Morgan.

Exhibit 47 – excerpts of the deposition of Charles Snell.

Exhibit 48 – excerpts of the deposition of Richard Emmett.

Exhibit 49 – excerpts of the deposition of Drayton Hamilton.

Exhibit 50 – excerpts of the deposition of Harold Orenstein.

Exhibit 51 – excerpts of the deposition of Richard Frank.

Exhibit 52 – excerpts of the deposition of Irene Smith.

Exhibit 53 – excerpts of the deposition of Roy Acuff.

Exhibit 54 – excerpts of the deposition of Jo Tanguay.

Exhibit 55 – excerpts of the deposition of Ada Johnson.

/s/ James A. Goodman
JAMES A. GOODMAN

SWORN TO BEFORE ME THIS
19TH DAY OF MARCH, 1987, IN
BEVERLY HILLS, CALIFORNIA.

/s/ Kim Gene Fugal
NOTARY PUBLIC IN AND FOR
SAID COUNTY AND STATE

SEAL OFFICIAL SEAL
KIM GENE FUGAL
NOTARY PUBIC – CALIFORNIA
LOS ANGELES COUNTY
My comm. expires NOV 2, 1990

APPENDIX G-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CATHY YVONNE STONE, an individual, Plaintiff, vs. HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a division of CHAPPELL & CO., INC., a Delaware corporation, ABERBACH ENTERPRISES, LTD., a New York corporation, ACUFF-ROSE-OPRYLAND MUSIC, INC., a Tennessee corporation, MILENE-OPRYLAND MUSIC, INC., a Tennessee corporation, WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc., FRED ROSE MUSIC, INC., a Tennessee corporation, and MILENE MUSIC, INC., a Tennessee corporation, Defendants.	CASE NO. 85 Civ. 7113 (JFK) AFFIDAVIT OF JAMES A. GOODMAN IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

AFFIDAVIT OF JAMES A. GOODMAN

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

JAMES A. GOODMAN, being duly sworn, deposes and says:

1. I am a member of the State Bar of California and a member of the law firm of Rudin, Richman & Appel, who, in association with the Law Firm of Coblence & Warner, and the Law Offices of F. Keith Adkinson, represent plaintiff Cathy Yvonne Stone (hereinafter "plaintiff") in connection with the foregoing matter. I have personal knowledge of the facts stated herein except for those stated upon information or belief or those stated to be my opinion, and as to those, I believe them to be true. If called upon to do so, I could and would competently testify thereto.

2. Attached hereto as *Exhibit 60* is a true and correct copy of a list of, in part, the compositions written in whole or in part by Hiriam "Hank" Williams (hereinafter "Hank Williams") and the dates that such compositions were copyrighted. The document also reflects, in the last two columns, the date each composition was renewed and the renewal number. This document was produced by defendant Acuff-Rose-Opryland Music, Inc. ("ARO Music") in discovery in this action.

3. Attached hereto as *Exhibit 61* is a true and correct copy of the "Petition for Letters of Administration" in the State of Alabama, Montgomery County Probate Court and executed by Lillian Stone and notarized by Robert

Stewart (hereinafter "Stewart") on or about January 6, 1953. The petition does not mention plaintiff.

4. Attached hereto as *Exhibit 62* is a true and correct copy of a letter dated January 31, 1953 from Irene Smith (hereinafter "Smith"), Hank Williams's sister and administratrix of the estate, to Robert Stewart, estate counsel.

5. Attached hereto as *Exhibit 63* is a true and correct copy of a February 2, 1953 statement from Smith wherein she states she will assist in "rearing" plaintiff.

6. Attached hereto as *Exhibit 64* is a true and correct copy of an April 6, 1953 letter from Smith to Stewart.

7. Attached hereto as *Exhibit 65* is a true and correct copy of the "Final Decree" in the Matter of the Estate of Lillian S. Williams, formerly Lillian S. Stone, deceased, in the Circuit Court of the State of Alabama, County of Montgomery, in Equity Case No. 28851, whereby the court set aside $2,281.14 as plaintiff's homestead right.

8. Attached hereto as *Exhibit 66* is a true and correct copy of a February 8, 1960 letter from Stewart to Wesley Rose (hereinafter "Rose"), of Acuff-Rose Publications, wherein Stewart solicited Rose's thinking on "the subject of renewal rights in general [and] as they apply to Hank [Williams's] compositions."

9. Attached hereto as *Exhibit 67* is a true and correct copy of a February 18, 1960 letter from Harold Orenstein (hereinafter "Orenstein"), counsel for Acuff-Rose Publications, to Stewart, inviting Stewart to discuss the matter of the Hank Williams renewal copyrights.

10. Attached hereto as *Exhibit 68* is a true and correct copy of a March 1, 1960 letter from Stewart to Rose,

wherein Stewart suggests a personal conference between Stewart and Orenstein concerning the Hank Williams renewal copyrights would be helpful.

11. Attached hereto as *Exhibit 69* is a true and correct copy of the March 14, 1960 letter from Rose to Stewart regarding a proposed conference between Orenstein and Stewart on the Hank Williams renewal copyrights.

12. Attached hereto as *Exhibit 70* is a true and correct copy of the March 16, 1960 letter from Stewart to Orenstein to arrange a conference on the Hank Williams renewal copyrights.

13. Attached hereto as *Exhibit 71* is a true and correct copy of the May 10, 1960 letter from Stewart to Orenstein concerning a proposed meeting between Rose, Stewart and Orenstein on the Hank Williams renewal copyrights.

14. Attached hereto as *Exhibit 72* is a true and correct copy of the February 16, 1962 letter from Stewart to Orenstein which references a meeting between Stewart and Orenstein. Therein, Stewart enclosed "certain documents relating to the child we discussed while I was last in New York."

15. Attached hereto as *Exhibit 73* is a true and correct copy of the February 28, 1962 letter from Orenstein to Stewart which specifically discusses, on page two thereof, Catherine Yvonne Stone. Orenstein, on behalf of Acuff-Rose, states, among other things that:

> "It would seem that some token payment to the State of Alabama Welfare Department again on behalf of this child may or may not be indicated (depending upon your viewing of the Alabama

> law). There is no way of evaluating now what a share of the renewal copyrights would be worth and no one could predict their valuation. We feel that a nominal payment might forever cut off the right of this child to the renewals. We should like to have further comment from you regarding the foregoing."

16. Attached hereto as *Exhibit 74* is a true and correct copy the April 27, 1962 letter from Orenstein to Stewart, again requesting his "further comment" requested in Exhibit 73.

17. Attached hereto as *Exhibit 75* is a true and correct copy of the May 1, 1962 letter from Stewart to Orenstein apologizing for not earlier replying because "some of the questions which you raised will require a little more study on [his] part . . . "

18. Attached hereto as *Exhibit 76* is a true and correct copy of the July 5, 1962 letter from Stewart to Orenstein which appears to discuss plaintiff exclusively. Stewart states, in part, that:

> "Paragraph D [of the February 28, 1962 letter] correctly states the facts, but the suggested solution of token payment bothers me. Whatever action is taken now should be effective to protect you for the future.
>
> * * *
>
> " . . . The [child's] adoption itself might affect any right which the child was entitled through the father, except that the statute on adoption specifically provides that it shall not be construed as barring an adopted child from inheriting property from a natural parent.
>
> We have a separate statute providing that illegitimate children do not inherit from their father.

> Since the statutory right of the child comes to it through its father, and since the federal courts have held this right belongs to an illegitimate, we may be faced with a difficult problem, and certainly one we would not want to litigate."

Robert Stewart, the estate's counsel and later the administrator of the estate, suggests the following alternatives to Acuff-Rose:

> "a. Consider that by the adoption all rights under the renewal statutes have been lost.
>
> b. Try to explain the matter to our Welfare Department, which does not want the child ever to know its background, . . . and hope for a cooperative settlement and court approval.
>
> c. Petition the court for [appointment of a guardian. But,] if we use this procedure, the guardian ad litem will have to be told what we are talking about, and might be vigorous in asserting this right. Much would depend on the person appointed, over which we have no control."

Stewart concluded:

> "I do not believe we can make a token payment to the Welfare Department since any payment which would bar a later claim would have to be made with an understanding of the facts by the court. My alternatives are not much better, but perhaps you can improve on them with a little thought."

19. Attached hereto as *Exhibit 77* is a true and correct copy of the July 20, 1962 letter from Allen H. Arrow, of Orenstein's office, to Stewart would be in San Francisco to discuss "the problems which we discussed in Nashville, concerning the estate of Hank Williams."

20. Attached hereto as *Exhibit 78* is a true and correct copy of the July 24, 1962 letter from Stewart to Allen Arrow.

21. Attached hereto as *Exhibit 79* is a true and correct copy of the September 18, 1962 letter from Orenstein to Stewart.

22. Attached hereto as *Exhibit 80* is a true and correct copy of the October 26, 1962 letter from Orenstein to Stewart.

23. Attached hereto as *Exhibit 81* is a true and correct copy of the October 31, 1962 letter from Stewart to Orenstein.

24. Attached hereto as *Exhibit 82* is a true and correct copy of the November 6, 1962 letter from Stewart to Harry Fox, wherein Stewart advised Fox that "We represent the Estate of Hank Williams, the Guardian of his only child, and his sister."

25. Attached hereto as *Exhibit 83* is a true and correct copy of the November 16, 1962 letter from Stewart to Orenstein.

26. Attached hereto as *Exhibit 84* is a true and correct copy of the December 12, 1962 letter from Stewart to Orenstein.

27. Attached hereto as *Exhibit 85* is a true and correct copy of the March 19, 1963 Order confirming the sale of Hank Williams Jr.'s publishing interests in the Hank Williams Sr. renewal copyrights to Acuff-Rose.

28. Attached hereto as *Exhibit 86* is a true and correct copy of excerpts of the deposition of Hank Williams

Jr.'s mother, Audrey Shepherd Williams, taken in the Matter of the Guardianship Estate of Randall Hank Williams on or about August 16, 1967. Therein, Audrey Williams confirms that "[plaintiff's] existence and its attendant problems has been known within the family for a great many years . . . "

29. Attached hereto as *Exhibit 87* is a true and correct copy of a transcript of the 1967 Guardianship Trial referred to by defendants in this action as the 1967-68 proceedings. These are the proceedings which took place in Alabama wherein plaintiff's interests in the Hank Williams renewal copyrights were purportedly adjudicated. This document was produced by defendant ARO Music pursuant to discovery in this action and, as I understand it, was transcribed from a tape recording of the proceedings. Therein, counsel for Williams Jr. asked that plaintiff's interests not be considered at the Guardianship Trial and counsel for Acuff-Rose insisted that they be considered.

30. Attached hereto as *Exhibit 88* is a true and correct copy of the "Memorandum Brief of Irene W. Smith as Administratrix of the Estate of Hiriam 'Hank' Williams, Deceased," filed in the 1967-1968 Montgomery litigation. As set forth by the Administratrix, the issue regarding plaintiff was whether the October 15, 1952 Agreement:

> "amounts to a statutory acknowledgment of this child, then it is entitled to a child's share of the estate. If not legitimated in accordance with the requirements of Alabama statute, the child is determined to an illigitimate [sic] child of [Hank Williams], it may possibly have now or in the future some interest in the renewal rights of the

songs of Randall [sic] Hank Williams under the Federal copyright statutes.

The Administratrix of this estate has been aware of the possible rights of the Jett child since it was born."

31. Attached hereto as *Exhibit 89* is a true and correct copy of "Brief In Argument As To Whether The Unborn Child Made The Subject Of Written Agreement Between Hank Williams And Bobbie W. Jett May Inherit From Hank Williams, Deceased, Under The Laws of Descent And Distribution Of Alabama" filed by counsel for Randall Hank Williams in the 1967-68 Montgomery, Alabama proceedings.

32. Attached hereto as *Exhibit 90* is a true and correct copy of excepts of Congressional bill in the 90th Congress, first session, "In the Senate of the United States, April 12, 1967." This document contains a definition of a person's children as "his immediate offspring, whether legitimate or not, and any children legally adopted from him." The excerpts were taken from the entire proposed amended Copyright Act which was produced by defendant ARO Music from the files of Orenstein pursuant to discovery in this action.

33. Attached hereto as *Exhibit 91* is a true and correct copy of the December 5, 1967 letter from Stewart to Smith.

34. Attached hereto as *Exhibit 92* is a true and correct copy of excepts of "Brief of One of the Respondents, Fred Rose Music, Inc.," filed in Case No. 27960 of the Montgomery, Alabama 1967-68 litigation. The brief reflects that in 1967, Acuff-Rose believed "all the original

copyrights in the songs of, Hank Williams have been assigned to Acuff-Rose and will not begin to expire until 1974." 1974 was the same year that plaintiff would reach her age of majority, twenty-one, and be advised of her statutory inheritance to which she was entitled from the Lillian Stone homestead.

35. Attached hereto as *Exhibit 93* is a true and correct copy of the March 8, 1972 letter from Stewart to Richard H. Frank Jr. (hereinafter "Frank") on the subject of plaintiff.

36. Attached hereto as *Exhibit 94* is a true and correct copy of an August 17, 1972 letter from Stewart to Frank, who then represented Williams Jr. The letter states in part that:

> "The last two distributions to Randall, of $12,500.00 and $8,000.00, were actually an encroachment on the one-half of the Estate which could conceivably be claimed by the child, . . . "

37. Attached hereto as *Exhibit 95* is a true and correct copy of the December 26, 1975 letter from Stewart to Frank (more than five years after entry of the Estate Order) which states: "I do not believe that [Judge Emmet] will authorize any further distributions until [plaintiff] reaches her twenty-second birthday, which will be January, 1975."

38. Attached hereto as *Exhibit 96* is a true and correct copy of the 1972 Order of the Montgomery County Circuit Court regarding, in part, plaintiff.

39. Attached hereto as *Exhibit 97* is a true and correct copy of excerpts of the deposition of defendant Billie

Jean Williams Berlin, taken in the action *Hill & Range Songs, Inc. v. Fred Rose Music, Inc.*

40. Attached hereto as *Exhibit 98* is a true and correct copy of a "Petition for Removal" of action filed by Acuff-Rose on November 20, 1967.

41. Attached hereto as *Exhibit 99* are true and correct copies of excerpts of the deposition of Stewart taken in the action *Hill & Range Songs, Inc. v. Fred Rose Music.*

42. Attached hereto as *Exhibit 100* is a true and correct copy of the November 1, 1973 letter from Stewart to William F. Carpenter Jr., counsel for Hill & Range Songs, Inc. in *Hill & Range Songs, Inc. v. Fred Rose Music.*

43. Attached hereto as *Exhibit 101* is a true and correct copy of the Stipulation enclosed in Exhibit 100 set forth above.

44. Attached hereto as *Exhibit 102* is a true and correct copy of the November 1, 1973 letter from Stewart to Frank.

45. Attached hereto as *Exhibit 103* is a true and correct copy of notes produced from the files of Stewart which state in part that, "Baby Jett – year expires Jan. '75."

46. Attached hereto as *Exhibit 104* is a true and correct copy of the April 4, 1974 letter from Stewart to Frank.

47. Attached hereto as *Exhibit 105* is a true and correct copy the May 11, 1983 letter from Joseph Matranga (hereinafter "Matranga") to Drayton N. Hamilton (hereinafter "Hamilton").

48. Attached hereto as *Exhibit 106* is a true and correct copy of the May 17, 1983 letter from Hamilton to Matranga.

49. Attached hereto as *Exhibit 107* is a true and correct copy of the August 23, 1983 letter from Hamilton to Matranga.

50. Attached hereto as *Exhibit 108* is a true and correct copy of the April 9, 1984 letter from Matranga to Cathy Stone.

51. Attached hereto as *Exhibit 109* is a true and correct copy of "Petition Seeking Clarification of Status and Instructions" and Order thereon, filed by Drayton Hamilton in Case No. 25056, in the 1967-1968 Montgomery litigation.

52. Attached hereto as *Exhibit 110* is a true and correct copy of a transcript of the proceedings of January 17, 1986 before the Honorable John F. Keenan of the United States District Court, Southern District of New York, in the within action.

53. During the discovery process in this action, plaintiff requested, among other things, information relating to the amount of money received by defendants from the exploitation of the Hank Williams renewal copyrights and the amount of money paid by ARO Music to Acuff-Rose for the purchase of its assets. Defendants refused to produce this information, plaintiff moved to compel, and that motion was denied on the grounds that such economic information was not discoverable until plaintiff first proved she had an interest in the Hank Williams renewal copyrights.

54. In June or July, 1986, in connection with the discovery process, I discovered certain documents, particularly those documents attached hereto as Exhibits 72, 73 and 76. Based principally on the discovery of those documents, plaintiff elected to amend her complaint, plead a second claim for relief for conspiracy to defraud and breach of fiduciary duty.

55. Attached hereto as *Exhibits 114 through 127* are true and correct copies of excerpts from depositions taken during the course of this litigation. The excerpts from the deposition transcripts are marked as follows:

Exhibit 114 – excerpts from the deposition of Mary Louise Deupree;

Exhibit 115 – excerpts from the deposition of Judge Richard P. Emmet, retired;

Exhibit 116 – excerpts from the deposition of Richard H. Frank Jr., Volume I;

Exhibit 117 – excerpts from the deposition of Richard H. Frank Jr., Volume II;

Exhibit 118 – excerpts from the deposition of Drayton Hamilton;

Exhibit 119 – excerpts from the deposition of Michael Joseph Mayer;

Exhibit 120 – excerpts from the deposition of Harold Orenstein;

Exhibit 121 – excerpts from the deposition of Wesley H. Rose, Volume I;

Exhibit 122 – excerpts from the deposition of Wesley H. Rose, Volume II;

Exhibit 123 – excerpts from the deposition of Irene Williams Smith;

Exhibit 124 – excerpts from the deposition of Catherine Yvonne Stone, Volume I;

Exhibit 125 – excerpts from the deposition of Catherine Yvonne Stone, Volume III;

Exhibit 126 – excerpts from the deposition of Francis Marston Wentworth Jr.; and

Exhibit 127 – excerpts from the deposition of Randall Hank Williams Jr.

56. Attached hereto are copies of the following non-federal cases and statutes:

Alabama Code §43-8-47, Inheritance by After Born Heirs;

Barnett v. Beck, 481 So.2d 348 (Ala. 1985);

Braggs v. Jim Skinner Ford, Inc., 432 So.2d 466 (Ala. 1983);

Denniston & Co., Inc. v. Jackson, 468 So.2d 170 (Ala. Civ. App. 1985);

Dominex, Inc. v. Key, 456 So.2d 1047 (Ala. 1964);

Estate of Garey, 214 Cal.App.2d 39; 29 Cal.Rptr. 98 (1963);

Estate of Pillsbury, 175 Cal. 454 (1917);

Hamilton v. Smith, 56 So.2d 283 (Ala. 1956).

Smith v. Alabama Dry Dock, 293 Ala.Rptr. 644 (1975);

/s/ James A. Goodman
JAMES A. GOODMAN

SWORN TO BEFORE ME THIS
28TH DAY OF APRIL, 1987
IN BEVERLY HILLS, CALIFORNIA.

/s/ Kim Gene Fugal
NOTARY PUBLIC IN AND FOR
SAID COUNTY AND STATE

OFFICIAL SEAL
KIM GENE FUGAL
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires NOV 2, 1990

APPENDIX H-1

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1988-89

Catherine Yvonne Stone

87-269

v.

Gulf American Fire and Casualty Co., et al.

Appeal from Montgomery Circuit Court

(CV-85-1316-K)

(Released July 5, 1989)

MADDOX, JUSTICE.

This appeal involves the estate of the late Hiriam "Hank" Williams and concerns the rights of Catherine Yvonne Stone, an illegitimate child who, in 1985, was declared by the trial court in this proceeding to be the natural child of Hank Williams, and the major questions presented are whether two final judgments entered in 1967 and 1968, which determined that Stone had no rights to share in the estate, can be reopened because of an alleged "legal fraud."

Stone appeals from a summary judgment against her third-party complaint, in which she asked that the two former judgments be set aside, which judgments had been entered in favor of third-party defendants Irene Smith; Jones, Murray and Stewart, P.C.; Gulf American Fire and Casualty Company; American States Insurance

Company (as successor in interest of Gulf American); and several fictitiously named parties.[1]

This case began as an action for declaratory judgment filed by Randall Hank Williams (hereinafter "Williams, Jr."), along with Roy Acuff and Wesley Rose, the trustees in liquidation of Fred Rose Music, Inc., and of Milene Music, Inc., seeking a declaration that Stone was barred from establishing that she is the natural child of Hank Williams and from asserting any claim or entitlement to his estate or to any interest or royalties flowing therefrom.[2] Stone filed a counterclaim on these issues, and, in

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[1] Irene Smith and Robert Stewart were the administratrix and administrator of the Williams estate, and Gulf American wrote the bond. The estate of Robert B. Stewart was dismissed as a third-party defendant by Stone on March 25, 1987.

[2] In their complaint for declaratory judgment, they asked for the following relief:

> "2. That this Court enforce and uphold in every respect the prior Orders and Judgments of this Court in Civil Action Nos. 25,056 and 27,960, declare them valid and binding upon the parties hereto, and enjoin Catherine Yvonne Stone from making further claims and demands relative to the estate of Hiriam "Hank" Williams or the aforesaid copyright interests or renewals thereof.
>
> "3. That in the event this Court alters, modifies or otherwise changes the prior Orders and Judgments in Action Nos. 25,056 and 27,960 that this Court proceed to adjudicate and determine the rights of the parties hereto with regard to the Estate of Hiriam Hank Williams and the copyright and renewal copyright interests of the musical compositions of Hiriam 'Hank' Williams.

(Continued on following page)

addition, the third-party complaint that now constitutes the basis of this appeal.

In her third-party complaint, Stone alleged an intentional, willful, fraudulent, and conspiratorial concealment from the court of her identity and potential claim to the estate of Hank Williams.[3] She requested that the estate be reopened and that she receive her proportionate share of the estate,[4] that she be awarded punitive damages, and that the sureties for the estate, Gulf American and American States, compensate her for damages not recovered against the other third-party defendants or real parties in interest.

(Continued from previous page)

"4. That this Court will grant to the Plaintiffs such other, further and different appropriate relief to which they may be entitled."

[3] In her first claim for relief in her third-party complaint Stone named Smith, Stewart, and several fictitiously named real parties in interest and alleged, inter alia, that "[f]rom in or about 1953 through sometime in 1967, Smith, Stewart and [Jones, Murray and Stewart], through Stewart, and real parties in interest C, D, E, F, G, H, I, J, K, M, and N, intentionally, willfully and fraudulently concealed Stone's identity, existence, claim, and rights as [a] natural child of Hank Williams, Sr. from the Montgomery County Circuit Court in contravention of their respective fiduciary obligations to Stone and in contravention of their respective obligations to the court."

[4] Stone's first claim for relief requested the following:

"1. That the estate of Williams, Sr. be reopened and all orders purportedly governing Stone's rights in that estate be declared null and void.

"2. That Stone be entitled to share her proportionate interest in all property and income of the estate."

In the proceedings below, the trial court entered summary judgment in favor of Williams, Jr., Acuff, and Rose on all issues contained in their original complaint and in Stone's counterclaim, with the exception of the issue of Stone's paternity, which it reserved for trial, and the trial court entered summary judgment in favor of all third-party defendants, including those fictitiously named, on Stone's third-party complaint, in which she asked, among other things, that the estate be reopened because of legal fraud. After a trial on the issue of paternity, the court found that Catherine Yvonne Stone is the natural child of Hank Williams. No appeal was taken from this judgment of paternity, and this finding is undisputed on appeal.[5]

Statement of the Facts

An understanding of the unique facts underlying this action is requisite to an understanding of this case, and it is because of these unique facts that we fashion the relief we do in this case. The trial judge entered a lengthy order in which he detailed the facts. We could include those findings, which we find to be supported by the record, in this opinion, but we think that a summary of those facts will be sufficient.

On October 15, 1952, Hank Williams entered into an agreement with Bobbie W. Jett relative to the custody and support of an unborn child carried by Jett. The agreement was prepared by and executed in the presence of Robert

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[5] Stone did not appeal the adverse ruling on her counterclaim either. We will discuss that issue in this opinion under the section "Relief Granted" *infra*.

B. Stewart, an attorney in the general practice of law in Montgomery, Alabama, who was one of the third-party defendants. The agreement provided, in part, as follows:

> "This agreement made this 15th day of October, 1952, by and between Hank Williams of Montgomery, Alabama, and Bobbie W. Jett of Nashville, Tennessee,
>
> "WITNESSETH
>
> "WHEREAS, the said Bobbie W. Jett is at the present time pregnant and expects to be delivered of a child on or about the 1st day of January, 1953, and the said Hank Williams may be the father of said child, and,
>
> "WHEREAS, it is the mutual desire of both parties to provide for the necessary expenses of the said Bobbie W. Jett and of the child to be born,
>
> "IT IS NOW, THEREFORE, mutually agreed by and between the said Bobbie W. Jett and the said Hank Williams as follows:
>
> " . . . That the said Hank Williams will provide room and board for the said Bobbie W. Jett in Montgomery, Alabama, from October 15th until the date said child is born . . . .
>
> " . . . That said Hank Williams shall pay all doctors and hospital bills in connection with the confinement of the mother and birth of the child . . . .
>
> " . . . Within 30 days after the birth of said child, the said Hank Williams shall provide a one-way plane ticket to the said Bobbie W. Jett from Montgomery to another place in California which she may designate . . . .

" . . . After the birth of said child, both parties agree that it shall be placed with Mrs. W. W. Stone of Montgomery [Hank Williams's mother], and that she shall have full custody and control of said child for a period of two years after its birth and that during said time the said Hank Williams will provide and pay for a nurse and will pay all necessary expenses for clothing, food, medical care, and other attention which is required by the child during said two year period. During said two year period that the child is in custody of Mrs. Stone, both the *father*, Hank Williams, and the said Bobbie W. Jett shall have the right to visit said child at convenient and reasonable hours. *Beginning at the third birthday of said child, its custody and control shall vest in the said Hank Williams and the child shall live with him continuously and be wholly and completely supported . . . by him, and cared for by him until it reaches its fifth birthday at which time the custody of the child shall be divided between both parties, that is, during the winter months or school months the child shall remain with Hank Williams and during the summer months or school vacation months the custody shall be in the mother. The responsibility for the support of said child shall be in Hank Williams both during the times when he has custody of the child and when it is visiting with the mother.* During the time that the child is in the custody of the *father*, Hank Williams, the mother shall have the right to visit it at reasonable times, and at reasonable hours, and during the time it is in the custody of the mother during the summer months the *father* shall have the same privilege of visitation.

> " . . . In view of the fact that the paternity of said child is in doubt and is not to be in any way construed as admitted by the agreement which is made solely because of the possibility of paternity, the said Bobbie W. Jett does hereby release the said Hank Williams from any and all further claims arising out of her condition or the birth of said child.
>
> "IN WITNESS WHEREOF, the parties have hereunto set their hands and on the day and date first above written.
>
> "/s/ _____
> "Bobbie W. Jett
>
> "/s/ _____
> "Hank Williams"

(Emphasis added).

On January 1, 1953, Hank Williams died intestate. Five days later, Bobbie Jett gave birth to a baby girl; she named the child Antha Bell Jett. By agreement, the child was left with Hank Williams's mother, Mrs. Lillian Williams Stone, and Jett left the state. Mrs. Stone immediately instituted adoption proceedings, and a final decree of adoption was entered on December 23, 1954. The child's name was changed to Catherine Yvonne Stone.

Shortly thereafter, on February 26, 1955, Lillian Stone died. Other family members were either unable or unwilling to care for the child, and, thus, at the age of two, she became a ward of the State. The child remained in foster homes until she was eventually adopted on April 23, 1959, at the age of six, by a Mobile couple, George and

Mary Deupree. Her name was then changed to Cathy Louise Deupree.

In that year, an action was brought on behalf of Williams, Jr., to obtain court approval of a contract between Fred Rose Music, Inc., and Williams, Jr., concerning his interest in the copyright renewals of his father. The matter of the Stone child was not raised in that proceeding, even though the record now before us shows that the parties to that contract knew of the agreement executed by Williams, Sr., and also that the State of Alabama, by and through its Department of Pensions and Security, knew of her parentage. Then, in 1967, Audrey Williams,[6] the mother of Williams, Jr., filed a petition in Montgomery Circuit Court for final settlement of the estate. She also instituted related proceedings in 1968, concerning the guardianship estate of Williams, Jr. At the time of the 1967 and 1968 proceedings, Irene Smith, the sister of Hank Williams, was the administratrix of the estate. It was in Smith's answer to Audrey Williams's petition that the court was advised, apparently for the first time, of the existence of the agreement and of the potential claim of the Stone child. In both the 1967 and the 1968 proceedings, the court appointed Drayton Hamilton, a Montgomery attorney, to serve as the child's guardian ad litem. Hamilton had previously served as her guardian ad litem in 1963 in proceedings relating to the estate of Lillian Stone; however, the record shows that in 1963, Hamilton knew only that Stone was an adopted child of Lillian Stone *and was not aware of her natural parentage.*

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[6] Audrey Williams and Hank Williams divorced in 1952.

During 1967 and 1968, Stone lived in Mobile with her adoptive parents. Hamilton notified the Deuprees of the proceedings, but they refused to participate in any matters involving the child's natural father. Despite the Deuprees' adverse position, Hamilton continued to represent the child and actively attempted to establish her rights. Even so, on December 1, 1967, Judge Richard P. Emmet, of the Montgomery County Circuit Court, issued an order stating that Stone had no right to inherit from the estate of Hank Williams. In a second order issued on January 30, 1968, in the related guardianship estate case of Williams, Jr., Judge Emmet again reiterated that Stone had no right to inherit from the estate. In neither proceeding did the court address the issue of Stone's paternity. After the court's adverse ruling, the guardian ad litem sought permission to appeal on behalf of the Stone child; however, the court denied him permission, and he did nothing further on the child's behalf.[7]

Despite the court's rulings in the 1967 and 1968 proceedings, once Stewart became the administrator of the estate in 1969, he began setting aside money for Stone in the event that she ever claimed an interest in the estate. However, the estate was closed in August 1975, without further incident.

The record shows that it was not until 1974, when Stone was 21 years of age and attending the University of Alabama, that the truth of her paternity was ever suggested to her. During that year, she was informed that the

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[7] For a more detailed discussion of why the guardian ad litem did not appeal, see *infra* at pp. 24-26.

Montgomery Circuit Court was holding certain funds for her from the *estate of Lillian Stone*. She was not informed that Stewart had been setting aside money for her. All the court records pertaining to the 1967 and 1968 proceedings were sealed. Stone traveled to Montgomery and received the proceeds of the *Lillian Stone estate*, and it appears that it was at that time that she began to seriously seek information concerning her natural parentage.

On October 17, 1979, Stone arranged a meeting with Emogene Austin of the Alabama Department of Pensions and Security for the purpose of verifying her paternity. The record shows that at that time she apparently did not know the name of her natural mother but suspected that Hank Williams was her natural father. Ms. Austin revealed the agency's information to her concerning her background, including information indicating that her natural father was Hank Williams; that information shows that the State of Alabama knew of her background from almost the beginning. However, throughout this time, all of the records concerning her paternity remained sealed by the Montgomery Circuit Court, and she had no knowledge of the existence of the custody and support agreement or of the fact that Stewart had been setting aside her share of the estate, even after the 1967 and 1968 decrees were entered.

Stone continued to search for and retrieve documents and other information bearing on this subject through the early part of 1985. On July 1, 1985, she filed an action in Montgomery Circuit Court requesting that documents relating to her paternity, formerly placed under seal by the Montgomery Circuit Court, be released to her. On August 5, 1985, Stone sent a demand letter to Williams,

Jr., Acuff, and Rose, advising them of her claim in the estate and asking to share in the copyright renewals of her father, Hank Williams. Subsequently, on September 10, 1985, Williams, Jr., Acuff, and Rose filed the action for declaratory judgment that eventually led to this appeal.

Issues

The primary issues presented by this appeal are:

I.) whether the former judgments rendered in the 1967 and 1968 proceedings involving Stone's right to share in the estate of Hank Williams can be reopened by reason of legal fraud on the court; and, if so,

II.) whether Stone's claim to set aside the former judgments is barred by the equitable doctrine of laches; and, if not, then

III.) to what relief, if any, is Stone entitled?

In determining the primary issues, we also address the following questions:

a) whether the administrator or the attorney for the estate, having independent knowledge of Stone's claims to the estate, had a duty to notify the court of these facts;

b) whether the trial court's failure, in the 1967 and 1968 proceedings, to grant the guardian ad litem permission to appeal the adverse ruling on behalf of Stone constitutes an error of law sufficient to warrant modification of the judgment;

c) whether an illegitimate child is entitled to inherit from her natural father;

d) whether the doctrines of res judicata and collateral estoppel are applicable to the issues involved in this case; and finally,

e) whether Stone's adoption, two years after the death of her natural father, precludes her from establishing her paternity for the purpose of intestate succession.

Fraud

We now address the first issue, concerning legal fraud. Stone argues that the trial court erred in entering a summary judgment for the third-party defendants in this case because, she says, the evidence shows that they fraudulently conspired to keep certain facts relating to her existence, identity, and potential claim to the estate of Hank Williams concealed from the court. We agree.

The record contains substantial evidence from which a factfinder could conclude that third-party defendants Robert Stewart and administratrix Irene Smith and others withheld from the court before and during the 1967 and 1968 proceedings material facts concerning the issue of Stone's paternity. The evidence that follows indicates the series of events that transpired both prior to and following the death of Hank Williams that directly affected the fate of the child for whom Williams had unequivocally accepted responsibility by executing an agreement which contains some equivocation, but in which he referred to himself three times as the "father." These events ultimately resulted in the foreclosure of any contract right that the child might otherwise have had under the 1952 custody and support agreement, as well as the adverse judgments concerning her right to inherit, which are now the subject of this appeal.

The record shows that on October 15, 1952, Hank Williams accompanied Bobbie Jett to the law offices of his

attorney, Robert Stewart, to discuss a legal arrangement concerning an unborn child being carried by Jett. Mrs. Lillian Stone, Hank Williams's mother, was also present. At this meeting, Stewart prepared the custody and support agreement involved in the present lawsuit. According to Stewart's testimony in the 1967 proceedings, he represented only Hank Williams at the time the agreement was executed and at no time was Bobbie Jett or the unborn child represented by counsel.

After Hank Williams's death in January 1953, it was Stewart who prepared the letters of administration that were issued to Williams's mother, Lillian Stone, as administratrix. Although Stewart knew of the child's existence, identity, and potential claim to the estate, because he had drafted the custody and support agreement only three months earlier, the letters of administration contained only the names of the following persons as heirs and distributees of the estate:

"Billie Jean Jones 'who states she is the widow,'

"Randall Hank Williams, Jr., }

"Mrs. Irene Williams Smith, a sister,

"Elonzo H. Williams, father, and

"Lillian S. Stone, mother."

It is interesting to note that the list did include Billie Jean Jones, "who states she is the widow" of the deceased; yet, *it did not include Stone.*

Over the course of 22 years following the death of Hank Williams, Stewart remained actively involved in the affairs of the Williams family. Throughout the years 1953 to 1975, Stewart served as the attorney for the estate, and

from 1969 through 1975 he also served as the administrator of the estate.

In 1953, Stewart even acted as Lillian Stone's attorney in her action to adopt the child. The record shows that at all times, Mrs. Stone held the child out to Stewart and to the world as the daughter of her deceased son, Hank Williams. This is evidenced by the following notes taken during an investigation conducted by the Montgomery County Department of Public Welfare, prior to Mrs. Stone's adoption of the child:

"1/28/53

> "Mrs. Stone discussed her situation with ease throughout the entire interview, but cried during the time that she was talking. She said that she was in the office in regard to a child which was born on January 6, 1953. She explained that the child is the daughter of Bobbie Webb Jett *and that the father of the child is her son, Hank Williams, deceased.* She brought with her a letter stating to whom it may concern and signed by Mr. Williams. It said that he would be responsible for the delivery of this child at the hospital where the mother desired. . . . She mentioned that she took care of Miss Jett throughout the pregnancy . . . [and] that her son took care of all the expenses during this time.
>
> " . . . She stated that Miss Jett had left the child at her home during the time that she was making a visit to Butler County, her home, and that she does not know what Miss Jett plans to do. She stated that she does not wish to keep the child unless she can adopt her and that she would be tremendously interested in doing so. *While crying, she stated that she knew that this is what her son would want her to do, and he once commented that he did not feel that Miss Jett was a*

suitable person to take care of the child. Mrs. Stone seemed quite devoted to the child and it was apparent that she was very desirous to keep this child as it appeared that she would feel closer to her son. She went on to say that Miss Jett lives in Nashville and that all their papers are with [Mrs. Stone's] lawyer, Mr. Robert B. Stewart. . . .

"* * * *

"During this interview, Mrs. Stone commented that she had a heart ailment and worker gathered that it must be somewhat serious. She said that Mr. Stewar[t] was not in accord with their adopting the child because of this heart condition and I went into a discussion with her asking her whether or not she was able to take care of the child and what plan would be made for its future in the event that this baby was left parentless. She stated that her daughter, Mrs. Irene Smith of Portsmouth, Va. would be glad to take the child and I wondered if she would be interested in taking her at this time. Mrs. Stone would not want her to take the child as she would like to have the baby herself." (Emphasis added.)

The adoption became final on December 23, 1954, following which Stewart continued to remain closely associated with the Williams family, and, in particular, with Irene Smith, Hank Williams's sister. The following letter, dated April 6, 1953, when the child was three months old, evidences the relationship of Smith and Stewart with regard to the estate of Hank Williams and the Stone child:

"Dear Mr. Stewart:

"* * * *

"The idea you have about making Billy [Hank Williams's reputed widow] a legal wife isn't bad at all but I fear that once you accept

her as one she will try every trick in the book. I keep thinking about the time when it will be necessary to renew copyrights on Hank's songs, as his legal wife she will be the one to do that unless of course that is one of the rights she gives up. Somehow I just can't picture her giving anything up.

"* * * *

"Thanks for sending the royalties check. It sure came in handy . . . . I want to thank you again for looking out for me. You know if mother adopts that child there will be a new will. Tee [Smith's husband] says that if she adopts it and then can't take care of it, he is not going to let me take it. Keep this under your hat, mabey [sic] it will never be necessary for me to have the child at all. I feel that the poor child would have a lot better chance in this life if it were adopted by someone that would never know of its origin at all. It won't be three years before someone will start telling it that it isn't exactly like other children. Oh, well I guess I sound like I just don't want mother to change her will but really that isn't it at all. I don't want a thing that we don't work for ourselves and whether or not I get that house or not doesn't bother me in the least. I am only thinking about that child. It may be the one thing that will help mother live to be a hundred[;] lets hope so. She seems to love it very much and will perhaps give it a wonderful chance."

Lillian Stone died on February 26, 1955. At that time, Smith became the administratrix of Hank Williams's estate and remained administratrix throughout the 1967 and 1968 litigation, until she relinquished her duties to Stewart in 1969. Also, after Lillian Stone's death, Smith and Stewart became directly involved in the decision-

making process concerning the fate of the child. The record shows that after Smith refused to fulfill her previous commitment to care for the child in the event that it ever became necessary, she initiated procedures to make the child *a ward of the State*. She was successful in her efforts, in part, because Mr. Stone, Lillian Stone's spouse, was unable to care for the child alone. The records of the Montgomery Department of Public Welfare reflect these events, as follows:

"3/10/55

"Mr. Bob Stewart, lawyer for Mrs. Stone, [deceased], called Miss Rainer on this date and stated that Mrs. Stone's daughter, Irene Smith, would like to come to the office to discuss what would be best for Kathy Stone, the adopted daughter of Mrs. Stone . . . .

"Later: Mr. and Mrs. Smith in office by appointment. Mrs. Smith stated that she felt that it would be for the best interest of Kathy if the child was placed for adoption and was no longer associated with Hank Williams' family. She explained that she and her husband were devoted to the child and would be perfectly willing to keep the child but feels that there would always be publicity and gossip connected with this baby. Mrs. Smith states that she knows she agreed to take Kathy in the event anything happened to her mother and that she is still willing to take the child but feels strongly that the child would always be subjected to ugly gossip and vicious rumors and would possibly be hurt very deeply in later years by this talk.

"Mr. and Mrs. Smith are at present living in Dallas, Texas, where Mr. Smith is in the Navy but Montgomery is their home and they plan to come back [here] in five (5) years when Mr.

Smith can retire. They also plan to return to Montgomery each year for the Hank Williams Memorial and Mrs. Smith stated that she could just hear the tongues wagging now when Kathy would ride down the street in an automobile as part of the parade to commemorate Hank. For these reasons Mrs. Smith feels that Kathy could lead a much more normal life if she was placed for adoption with another family. Mrs. Smith seems to be very sincere and earnest in her opions [sic] about Kathy's future, and reiterated that she was not trying to get out of raising this child. She does not want this department to think that she is shirking her duty or ashamed to take the child and kept asking if we did not agree that she was right in her way of thinking. Both Mr. and Mrs. Smith stated that if Montgomery were not their home and they did not plan to reside here permanently at the end of Mr. Smith's tour of duty with the Navy, that they would not hesitate to take Kathy and raise her as their own child. They feel that so many people know about the child however that whereever [sic] they might live, rumor and gossip would catch up with them and Kathy would always be affected by unfavorable publicity.

"We explained to Mr. and Mrs. Smith that as the adoption had been granted final, Mr. Stone was the legal parent . . . and we wondered how Mr. Stone felt about placing the child for adoption. Both Mr. and Mrs. Smith stated that Mr. Stone was a very emotional person and he would like for the Smiths to take Kathy and rear her. They have not talked to him as yet about what would be best for Kathy but they feel that they would have a hard time making Mr. Stone see their point of view. . . .

"At the present time, Kathy is staying part time with the Smiths and part time with Marie Glenn . . . . Mrs. Smith stated that Kathy was

much happier with Marie than she was with the Smiths as she cried continuously while they had her. Mrs. Smith stated that Kathy was a very nervous child and seemed to miss Mrs. Stone a great deal. Mrs. Smith wondered if it was all right for Kathy to remain with Marie until other plans could be worked out. Worker told Mrs. Smith that we felt wherever the child was happiest would be all right until permanent plans could be made.

" . . . Mrs. Smith stated that she was very anxious to have the placement of the child settled as she had already received numerous telephone calls asking what would become of the child. She states that she did not realize so many people knew about this child but she has had telephone calls from Ohio and other various states regarding Kathy and who Kathy would live with now. Mrs. Smith seems to feel there will be a great deal of publicity regarding Kathy's placement. Mrs. Smith was assured that all of our dealings would be strictly confidential and it would be handled as quietly as possible. . . .

"3/11/55

"Mr. and Mrs. Smith and Mr. Stone in office late in the afternoon. Mr. Stone apologized that he was in his work clothes and said that he came straight from work. Mrs. Smith stated that she had told Mr. Stone their feelings regarding their not taking Kathy and he seemed to understand. Mr. Stone stated that he could not possibly take care of Kathy and he guessed it would be best for her to be placed for adoption. Mr. Stone was quite emotional and cried but after a lengthy discussion stated again that he could see nothing else to do but have the child placed for adoption. He seemed sincere in his decision and signed a Boarding Home Agreement with

this Department. We explained to Mr. Stone that we would make an appointment with him to go to the Juvenile Court to sign a Petition and would place Kathy in a boarding home until permanent plans could be made for the State to assume her custody.

"3/15/55

"Worker met Mr. Stone at the Juvenile Court, after an appointment had been made. Mr. Stone told Mrs. Dees that he felt this was the best plan for Kathy although it hurt him very deeply to give her up. Mr. Stone was very emotional and cried during the interview . . . .

"3/17/55

"Mrs. Smith in office by appointment as we explained that we would like as much background information on the alleged father of Kathy as possible as it would help in finding the most suitable home for the child. Mrs. Smith seemed to thoroughly understand and was quite willing to give any information and cooperate in every way. Mrs. Smith told us that Hank Williams was six feet, two inches (6' 2") tall, had a rather dark complexion which she would classify as almost olive. She said that she has the same skin which worker would say was almost olive. Mr. Williams was a brunette with brown eyes. He attended school through the tenth grade but did not like school too well. She added that he was very capable and made excellent grades in the things that he liked. He started singing at the age of five (5) and started playing the guitar at age seven (7). Mrs. Smith stated that she would consider her brother a musician, poet, composer, and philosopher."

On April 22, 1955, less than two months after Lillian Stone's death, Stone was made a ward of the State.

The record shows that Stewart acted as the attorney for the estate as early as 1953 and that Smith became the administratrix in 1955, but neither apprised the court of the evidence of the child, despite their intimate knowledge of her claims as a potential heir to the estate and as a possible creditor under the terms of the agreement to provide support. The following letter, dated February 28, 1962, written to Stewart by attorney Harold Orenstein, legal counsel for Wesley Rose, shows Stewart's knowledge of Stone's potential right to share in her father's copyright renewals:

> " . . . From the documents which you have furnished to me, Catherine Yvonne Stone (born Antha Belle Jett) was returned to the State of Alabama Welfare department after the death of Lillian Stone, and then re-adopted by persons unknown. *Nowhere in the documents is there an indication of the names of the natural parents of Catherine Yvonne Stone. We assume that these documents were the ones that you mentioned had been sealed and could never be re-opened.* However, we note that the child was given a certain sum of money for its 'homestead' rights in the property of Lillian Stone. . . . *It would seem that some token payment to the State of Alabama Welfare Department again on behalf of this child may or may not be indicated (depending upon your viewing of the Alabama law). There is no way of evaluating now what a share of the renewal copyrights would be worth and no one could predict their valuation. We feel that a nominal payment might forever cut off the right of this child to the renewals.* We should like to have further comment from you regarding the foregoing.
>
> " . . . I shall confer with Wesley [Rose] after he has received [a] copy of this letter and, after having heard from you regarding Catherine

Yvonne Stone, proceed to draw up an agreement which we can present both to the courts and to Audrey Williams." (Emphasis added.)

In a second letter, dated July 5, 1962, Stewart responded:

"None of this would seem to affect the child's statutory right to copyright renewal. . . .

" . . . Since the statutory right of the child comes to it through its father, and since the federal courts have held this right belongs to an illegitimate, *we may be faced with a difficult problem, and certainly one we would not want to litigate.*

"As possible alternatives we can:

"a. Consider that by the adoption all rights under the renewal statutes have been lost.

"b. Try to explain the matter to our Welfare Department, which does not want the child ever to know its background, *but which would probably feel a duty to protect any right the child might have, and hope for a cooperative settlement and court approval.*

"c. Petition the court for approval of an agreement between Acuff-Rose and the Guardian, requesting that a guardian ad litem be appointed for Randall and another for all other possible minors who might claim a similar renewal right. *If we use this procedure, the guardian ad litem will have to be told what we are talking about, and might be vigorous in asserting this right. Much would depend on the person appointed, over which we have no control.*

"I do not believe we can make a token payment to the Welfare Department since any payment which would bar a later claim would have to be made with an understanding of the facts by the court. My

> alternatives are not much better, but perhaps you can improve on them with a little thought." (Emphasis added.)

No proceedings concerning the estate of Hank Williams were ever instituted on behalf of the Stone child. However, as stated earlier, in 1967, when Audrey Williams petitioned the court for final settlement of the estate on behalf of Williams, Jr., Smith, as administratrix, finally advised the court that there might possibly be an illegitimate child of the deceased somewhere, and the court then appointed Drayton Hamilton to serve as the child's guardian ad litem in both the 1967 and 1968 proceedings.[8]

The record shows that during the 1967 proceedings, Hamilton called Stewart to testify concerning his knowledge of the circumstances surrounding the child's claim to the estate. Again, despite Stewart's extensive knowledge of these circumstances from his involvement with the child's father, mother, grandmother, and aunt, he revealed nothing, with the sole exception of producing the original custody and support agreement. Certainly he did not reveal the contents of all the correspondence and

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[8] It is interesting to note that Smith, who was the administratrix for the estate during 1967 and 1968, also acted as the guardian for Williams, Jr., during these proceedings. Further, she had also acted as the guardian for Williams, Jr., while administratrix, in 1963, in the proceeding to allow Williams, Jr., to contract with Fred Rose Music, Inc., concerning his interest in his father's copyright renewals. It is also interesting that this procedure is in substance the one suggested by Stewart in his July 5, 1962, letter, as alternative "c", that is, a legal way to cut off Stone's right to copyright renewals she was entitled to under federal law, even though illegitimate.

information he knew concerning Stone's adoption and the information furnished to the Department of Pensions and Security. Smith, too, aside from advising the court of the existence of the child, remained silent about what she knew.

Stewart's plan, as proposed in his July 5, 1962, letter to Wesley Rose's attorney, suggested that the person appointed as guardian ad litem "might be vigorous in asserting this right [to copyright renewals]." Hamilton was vigorous. He fought for the child's rights, even without material evidence concerning her paternity. Hamilton argued that Hank Williams had accepted the child as his own and had made legal arrangements to have full custody and control of the child, and that if the law did not recognize her right to inherit simply because she was illegitimate, then the law was unconstitutional and should be changed.[9] Despite Hamilton's efforts, with the

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[9] In fact, on May 28, 1968, just 4 months after Judge Emmet denied the guardian ad litem permission to appeal, the Supreme Court of the United States, in *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968), commented on the harsh common law concept that illegitimate children were *nullius fillius*, as follows:

> "We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment.
>
> "* * * *
>
> "Why should the illegitimate child be denied rights merely because of his birth out of wedlock?

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evidence that it had before it at the time, the trial court ruled against the child in both the 1967 and 1968 proceedings.[10] Hamilton, then as the guardian ad litem, requested permission to appeal the rulings on behalf of the child,

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> He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?"

391 U.S. at 70-71.

[10] In its December 1, 1967, order, the court stated:

> "In the opinion of the Court, there has not been sufficient compliance with the requirements of Section 11 of Title 27 of the Code of Alabama to give the child in question any right of inheritance from Hiriam Hank Williams or to receive any part of his estate. The Court is further of the opinion that under all the evidence heard and considered by the Court, Randall Williams is the sole heir and only distributee of the Estate of Hiriam Hank Williams . . . ."

Furthermore, in its January 30, 1968, decree, the court stated that while it was "impressed with the argument of the Guardian Ad Litem [for Stone]," and "adopt[ed] the sound reasoning . . . that the time is long past due when illegitimate offspring should be afforded adequate property rights," the court, nevertheless, found that Stone had been adopted and that her adoptive parents, after having been notified of the proceedings, "chose not to pursue any action in regard to these proceedings," and that she could not recover.

The trial court's conclusion that adoption precluded an "after-adopted" illegitimate child from inheriting was erroneous, however. This subject is discussed, *infra*, under the heading "Intestate Succession and the Illegitimate Child."

but the court refused to grant permission. Thus, Hamilton's court-appointed representation of the Stone child ended, and nothing further was done on her behalf.[11]

Despite the court's rulings in the 1967 and 1968 proceedings, when Stewart became the administrator of the estate in 1969, he began setting aside a share of the estate for Stone. During that time, in a series of letters to the attorney for Williams, Jr., Stewart wrote that "the last two distributions to Randall . . . were actually an encroachment on the one-half of the Estate which could conceivably be claimed by the child." Stewart's concealment with regard to the Stone child continued, and in April 1974 he alerted counsel for Williams, Jr., that Stone had traveled to Montgomery and claimed her homestead that had been set aside for her in the Lillian Stone estate. Stewart wrote: "[Her] ancestry may well be reasonably obvious to her, and further trouble may ensue." However, the estate of Hank Williams was closed in August 1975, without further incident, and the money that Stewart had been setting aside for Stone was distributed along with the other assets of the estate.

The law in Alabama concerning legal fraud has been stated by this Court as follows:

> "To constitute fraud, in its legal signification, it is not necessary that one intend to injure another. . . .

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[11] See our discussion, *infra*, under "Error of Law," concerning the right of a guardian ad litem to appeal an adverse ruling on behalf of a child, and the duties of a guardian ad litem and the duty of the court when a minor's interest is involved.

> " 'If fraud is proved the law will infer an improper motive, and the actual motive of the speaker is immaterial. In other words, it is not essential that the [misrepresentor] be motivated by a desire to injure complainant or to benefit himself; and it makes no difference that his motive was solely to benefit a third person.' "

Duncan v. Johnson, 338 So. 2d 1243, 1250 (Ala. 1976) (quoting C.J.S. *Fraud* § 26). With regard to fraud on the court, this Court has further recognized the following principles:

> " '[Where] the fraud itself [is] to be consummated through the instrumentality of a court of justice, the protection of the court demands that there should be a remedy. We can conceive of no worse reflection upon a judicial system, no lowering of its dignity and of the respect due to its findings more regrettable than that the tribunal of justice may become an impotent agency of fraud against those who look to it for protection and who are free from fault. . . .' "

Duncan, 338 So. 2d at 1251 (quoting *Bolden v. Sloss-Sheffield Steel & Iron Co.*, 215 Ala. 334, 335, 110 So. 574, 575 (1925)). Stated differently:

> " 'Where [fraud] relates to the conduct of the suit, as where it prevents a party from asserting his rights, there is no fair adversary proceeding, *and equity will interfere.*' "

Eskridge v. Brown, 208 Ala. 210, 211, 94 So. 353, 354 (1922) (quoting 6 *Pom. Eq. Jur.* at 1092) (emphasis added).

The idea that as an attorney, Stewart had a fiduciary relationship with the estate of Hank Williams, his client, is elementary. See *Jones v. Caraway*, 205 Ala. 327, 87 So.

820 (1921); *Kidd v. Williams*, 132 Ala. 140, 143, 31 So. 458 (1901); and *Yonge v. Hooper*, 73 Ala. 119 (1882). In *Yonge*, this Court recognized that

> "[an] [a]ttorney and client sustain to each other the severe relation of trustee and *cestui que trust*, and their dealings together are subject to the same intendments and imputations, as those which obtain between other trustees and their beneficiaries."

Yonge, 73 Ala. at 121.

Furthermore, Stewart, as administrator, and Smith, as administratrix, held the position of a trustee, and their administration of the estate was that of a trust. See *Clark v. Clark*, 287 Ala. 42, 47, 247 So. 2d 361, 365 (1971); *Keith & Wilkinson v. Forsythe*, 227 Ala. 555, 557, 151 So. 60, 61 (1933). In *Maryland Casualty Co. v. Owens*, 261 Ala. 446, 451, 74 So. 2d 608, 612 (1954), this Court recognized that

> "[a]n executor occupies a position of trust with respect to those interested in the estate and is the representative of the decedent, of creditors and of the legatees and distributees."

(Citing *Durden v. Neighbors*, 232 Ala. 496, 168 So. 887, 889 (1936); and *Amos v. Toolen*, 232 Ala. 587, 168 So. 687, 692 (1936).) At the time this estate was being administered, the law of Alabama imposed the following requirements upon an administrator:

> "In making settlements of an administration, the executor or administrator must proceed as follows:
>
> "* * * *
>
> "He must, at the same time, file a statement, on oath, of the names of the heirs and legatees

> of such estate, specifying particularly which are under the age of twenty-one years. . . ."

Tit. 61, § 295, Code of Alabama, 1940, presently Code 1975, § 43-2-502. This Court has held that an administrator who knowingly and willingly conceals from the court administering an estate the name of an heir or distributee, is guilty of such a fraud on the court as to authorize a court of equity to set the decree of settlement aside. See *Fidelity & Deposit Co. of Maryland v. Hendrix*, 215 Ala. 555, 112 So. 117 (1927); and *cf., Leflore By and Through Primer v. Coleman*, 521 So.2d 863 (Miss. 1988); *Smith By and Through Young v. Estate of King*, 501 So.2d 1120 (Miss. 1987); *Matter of Estate of Flowers*, 493 So.2d 950 (Miss. 1986).

We recognize, generally, that mere silence does not constitute fraud; however, a different rule applies where confidential relations or particular circumstances exist. Code 1975, § 6-5-102, provides:

> "Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. *The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case.*" (Emphasis added.)

Furthermore, it has been recognized that

> "[a] fiduciary duty need not spring from a legal relation but may arise from a relation which is merely moral, social, domestic, or purely personal in character, and that fiduciary relations embrace not alone the obviously confidential relations such as attorney and client, principal and agent, guardian and ward, and the like, but also every relation in which as matter of fact there is confidence reposed on one side and a

> resultant domination and influence on the other."

17 C.J.S. *Contracts*, § 154 at 911 (1963).

In the present case, both Stewart and Smith had a legal obligation, as either the attorney or administrator of the estate or because of the particular circumstances involved, to advise the court at the earliest possible date that the Stone child existed and possessed potential claims to the estate as an heir, being a natural child of the deceased, and as a creditor under the child support agreement. *Because the corpus of the estate involved copyright renewals, and because illegitimates could share in such rights under federal law, the "particular circumstances" of this case make the legal obligation a weightier one.* The evidence shows that Stewart, as administrator, and as attorney for Smith, knew that the child had a substantial claim to the copyright renewals.[12] Except for efforts by guardian ad litem Hamilton, no effort on behalf of Stone was made to establish her right to inherit or to establish her contract claim for child support under the 1952 agreement. Likewise, because all of the material circumstances surrounding her paternity were never made known to the court in the ancillary proceedings brought on behalf of Williams, Jr., Stone never received a "fair adversary proceeding," to which she was entitled by law. See *Eskridge*, 208 Ala. 210, 211, 94 So. 353, 354 (1922).[13]

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[12] His withholding of one-half of the monies, even after the favorable 1967 and 1968 decrees, and his 1962 correspondence shows his concern about the child's ever discovering who she was.

[13] We note that, usually, paternity or legitimation proceedings are initiated by a parent of the child; however, in this case

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Whether Stewart and Smith intended to deceive the court or merely sought to protect their own interests or the interests of Williams, Jr., or any other parties interested in the estate, or whether they intended to injure the Stone child is immaterial. Inasmuch as they remained silent about material facts concerning the Stone child, known to them, upon which the law imposed a legal duty to communicate, their actions constituted legal fraud. See Code 1975, § 6-5-102, formerly Tit. 7, § 109, Code of Alabama, 1940.

Further, it would appear that Smith's eventual notification to the court about the agreement, in 1967, was not for the purpose of showing Stone's right to share in the estate, but, rather, for the opposite purpose of showing that she had no right to share in the estate.[14] In her answer to the 1967 action, Smith responded that "she believes Randall Hank Williams is the sole heir of his

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Stone's natural parents were deceased or unavailable and her adoptive parents were hostile in regard to this matter. Furthermore, once Stone was made a ward of the state, the Alabama Department of Pensions and Security could have pursued the child's rights; however, it did not. Finally, while Stone was a ward of the court, Judge Emmet, although convinced that the law regarding illegitimates was not right (and the Supreme Court of the United States so held in *Levy v. Louisiana* shortly thereafter), he, too, failed in his duty to protect the child's right by refusing to grant her guardian ad litem permission to appeal (see discussion, *infra*, "Error of Law").

[14] We have previously noted that this procedure was substantially what Stewart had suggested to Wesley Rose's attorney in 1962 as an alternative way to forever bar Stone from sharing in the copyright renewals.

father, Hiriam 'Hank' Williams, . . . ; however, in the possession of the administratrix are certain documents which may give rise to or affect the rights of another minor to share in said estate . . . ." That answer was prepared by Stewart, who at that time was aware that the *copyright laws allowed illegitimates to inherit.*

We cannot say that Smith's and Stewart's concealment did not affect the judgments ultimately rendered in the 1967 and 1968 proceedings, which denied Stone any right in her natural father's estate. While we recognize that the law in Alabama at that time was unfavorable to illegitimate children with regard to intestate succession from their *fathers*, we cannot say that Stone would not have prevailed upon appeal, because of the strong statements made in *Levy v. Louisiana*, which was extant at the time the appeal would have been pending had one been filed. In short, this Court very well could have reached the result it reached later in the case of *Everage v. Gibson*, 372 So. 2d 829 (Ala. 1979), cert. denied, 445 U.S. 931 (1980), and could have recognized Stone's right, as the natural child of Hank Williams, to inherit from his estate. Because of the circumstances surrounding the 1967 and 1968 decrees, there are grounds for setting them aside, at least in part, for the reasons we shall hereinafter state.

Error of Law

At this time, we address another circumstance bearing on the validity of the 1967 and 1968 judgments. The record shows that after the trial court ruled against Stone in both proceedings, Hamilton, as her guardian ad litem, requested permission to appeal the rulings on her behalf.

Even though Judge Emmet thought the law was wrong, he denied Hamilton permission to appeal. After being denied the right to appeal, Hamilton did nothing further on her behalf.

Under the law as it exists today and as it was at the time of the proceedings in question, Stone, or her guardian ad litem acting on her behalf, had the right to appeal the trial court's adverse ruling to this Court. Title 7, § 754, Code of Alabama, 1940 (Recompiled 1958) (now, Code 1975, § 12-22-2) provided for appeals from the circuit court to the Supreme Court, as follows:

> "From any final judgment or decree of the circuit court, or courts of like jurisdiction, or probate court, except in such cases as are otherwise directed by law, *an appeal lies to the supreme court, for the examination thereof as matter of right, on the application of either party, or his personal representative;* and the clerk, register, or judge of probate, must certify the fact that such appeal was taken, and the time when, as part of the record, which gives the supreme court jurisdiction of the case." (Emphasis added).

In addition, Tit. 7, § 786, Code of Alabama 1940 (Recompiled 1958), provided that "a guardian ad litem may take and prosecute an appeal without giving any security for costs of the appeal, and shall not be liable personally for costs of appeal."

In the present case, after the trial court refused to grant permission to appeal the adverse ruling, Hamilton understandably considered his representation of the child ended. The general rule is that "[a] guardian ad litem or next friend is always subject to the supervision and control of the court, and he may act only in accordance with

the instructions of the court." 43 C.J.S. *Infants* § 234, p. 610 (1978). Furthermore, at the time of these proceedings, this Court had construed Tit. 7, § 786, to hold that a guardian ad litem was *personally liable* for the costs of an appeal taken from a decree of the probate court, if the judgment of the lower court was affirmed. See *Ward v. Mathews*, 122 Ala. 188, 25 So. 50 (1898).

Because Stone was a ward of the court, it was the duty of the court, even though it had appointed a representative for Stone, to protect her rights and interests, on its own motion.[15] See 43 C.J.S. *Infants*, § 220, p. 564; see

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[15] We are aware that there are many settlements involving minors made in pending lawsuits, in which courts are called upon to make certain that such settlements are in the best interest of the minor. We further note that Alabama law has been especially sensitive with regard to the rule that any settlements made on behalf of minors be approved by the court. In *Large v. Hayes*, 534 So.2d 1101 (Ala. 1988), this Court recognized the role of the trial court in determining what is in the "best interest of the minor," as follows:

> "This Court has recognized the special nature of an attempted settlement of a minor's claim. Before such a settlement can be approved, there must be a hearing, with an extensive examination of the facts, to determine whether the settlement is in the best interest of the minor. . . .
>
> > " ' "The Court may, upon being advised of the facts, upon hearing the evidence, enter up a valid and binding judgment for the amount so attempted to be agreed upon, but this is not because of the agreement at all – that should exert no influence – but because it appears from

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also *Fletcher v. First Nat'l Bank of Opelika*, 244 Ala. 98, 11 So. 2d 854 (1943) (which recognized that a court of equity is the guardian of all infants within its jurisdiction). Therefore, there can be no question that the trial court's refusal to allow Stone to utilize her right to appeal constituted an error of law, especially when the judge's order that disallowed her claim stated on its face that he did not consider it to be in her best interest.

Code 1975, § 12-11-60, formerly Code 1940, Tit. 13, § 145, provides:

> "(a) When any error of law or fact has occurred in the settlement of any estate of a decedent to the injury of any party, without any fault or neglect on his part, such party may correct such error by filing a complaint in the circuit court within two years after the final settlement thereof. . . .
>
> "(b) The limitations of subsection (a) of this section do not extend to infants or persons of unsound mind who are allowed two years after the termination of their respective disabilities, but in no case to exceed 20 years."[16]

Under this section, an error of law is sufficient to warrant modification of the judgment rendered in the shadow of

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> the evidence that the amount is just and fair, and a judgment therefor will be conservative of the minor's interests." '"

Large, 534 So.2d at 1105 (citations omitted).

[16] The issues of statutes of limitations and laches, as they relate to this case, are treated in our discussion under the heading "Timeliness," *infra*.

that error, even in the absence of fraud. See *Maryland Casualty Co. v. Owens*, 261 Ala. 446, 450, 74 So. 2d 608, 610-11 (1954).

Similarly, Rule 60(b)(6), Ala.R.Civ.P., provides that the court may relieve a party from the operation of a final judgment for any reason justifying such relief. An error of law, such as the one committed by the trial court in the 1967 and 1968 proceedings involving this estate, and that error's attendant consequences, would certainly appear to justify relief under this rule.

Therefore, even absent a finding that the judgments rendered against Stone in 1967 and 1968 were tainted by legal fraud, we would be compelled by the serious nature of the error committed by the trial court in those proceedings to revisit the judgments and modify their operation with respect to her rights, especially since the beneficiaries of those decrees and of the subsequent final settlement are the same individuals who were attempting to secure a judicial determination that would bar her right to share in copyright renewals. At the very least, this error of law aborted any res judicata effect of the 1967 and 1968 decrees.

Timeliness

Having found merit in Stone's claim that the 1967 and 1968 judgments rendered against her should be set aside, we now address whether her delay in asserting

that claim was reasonable.[17] Her claim, being equitable in nature, is governed by the doctrine of laches.

The doctrine of laches is purely equitable in nature and may be invoked to deny equitable relief to one guilty of unconscionable delay in asserting a claim. See *United States v. Olin Corp.*, 606 F.Supp. 1301, 1309 (N.D. Ala. 1985). However, this Court has recognized that the mere lapse of time alone does not establish laches. See *Davis v. Thomaston*, 420 So. 2d 82, 84 (Ala. 1982). Rather, the question of laches is one that must be decided upon the peculiar facts and circumstances of each case. See *Lindley v. Lindley*, 274 Ala. 570, 575, 150 So. 2d 746, 750 (1963); and *Jones v. Boothe*, 270 Ala. 420, 424, 119 So. 2d 203, 207 (1960). In *Multer v. Multer*, 280 Ala. 458, 462, 195 So. 2d 105, 109 (1966), this Court recognized that

> " '[l]aches is not fixed by a hard and fast limit of time, but is a principle of good conscience dependent on the facts of each case.' "

(Quoting *Woods v. Sanders*, 247 Ala. 492, 496, 25 So.2d 141, 144 (1946)). In addition, this Court has held that a party will not be estopped from asserting a fact of which he was ignorant, if upon discovery of that fact, he promptly seeks relief. See *Duncan v. Johnson*, 338 So. 2d 1243, 1254 (Ala. 1976). Stated differently, the doctrine of laches will not apply in the absence of information and knowledge sufficient to put one on notice of a claim. *Id.*; see also *Sims v. Lewis*, 374 So. 2d 298, 305 (Ala. 1979); and *Cotney v.*

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[17] The reader should bear in mind that no issue has been raised as to the timeliness of Stone's paternity action below. Therefore, our discussion concerns only her action to have the prior judgments set aside on the basis of fraud.

Eason, 269 Ala. 354, 357, 113 So. 2d 512, 516 (1959). The law recognizes that for the doctrine of laches to apply, the party claiming the right must have failed to do something that equity would have required him to do. See *Olin Corp.*, 606 F.Supp. at 1309; and *Sims*, 374 So. 2d at 305.

In the present case, the estate of Hank Williams was not finally closed until August 1975. The record shows that only one year earlier, in 1974, was the truth of Stone's paternity first suggested to her, and, at that time, it appears to have been presented merely as theory or speculation. Before 1974, for personal reasons, Stone's adoptive parents had vowed that she never know the identity of her natural father, and it appears that they were successful in concealing this information from her. The record also shows that at the early age of three, Stone had been transferred from Montgomery, permanently, to an adoptive home in Mobile, which effectively removed her from any persons who might have known her identity. In addition, as previously discussed, the record is quite clear that the attorney and administratrix of the estate and others did all that they could, including committing legal fraud, to ensure that she never discover her identity or any facts material to her claim, and the record shows that the State of Alabama, acting through the Department of Pensions and Security, and the courts essentially contributed to the concealment of her parenthood, although aware of it. Any public records, or documents that might have led to her discovery of her paternity at an earlier date had been ordered sealed by the court from the time that she was a small child. Upon retrieving these sealed documents in *1985*, Stone promptly made a demand for her share, and the plaintiffs

instituted this action for a determination of her rights in view of the prior judgments.[18] Based on all of these considerations, we conclude that her attack on, and request for relief from, the prior judgments rendered in this matter are not time-barred.

Intestate Succession and the Illegitimate Child

Having found that the judgments rendered against Stone in the 1967 and 1968 proceedings may be set aside

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[18] We also note that Williams, Jr., Acuff, and Rose are the parties who initiated the litigation from which this appeal arose, and who, themselves, sought a resolution of the matter of Stone's rights in the estate of Hank Williams.

In their complaint for declaratory judgment, Williams, Jr., Acuff, and Rose requested the following relief:

> "2. That this Court enforce and uphold in every respect the prior Orders and Judgments of this Court in Civil Action Nos. 25,056 and 27,960, declare them valid and binding upon the parties hereto, and enjoin Catherine Yvonne Stone from making further claims and demands relative to the estate of Hiriam 'Hank' Williams or the aforesaid copyright interest or renewals thereof.
>
> "3. That in the event his Court alters, modifies or otherwise changes the prior Orders and Judgments in Actions No. 25,056 and 27,960 that this court proceed to adjudicate and determine the rights of the parties hereto with regard to the Estate of Hiriam 'Hank' Williams and the copyright and renewal copyright interest of the musical compositions of Hiriam 'Hank' Williams.
>
> "4. That this Court will grant to the Plaintiffs such other, further and different appropriate relief to which they may be entitled."

with respect to her right to share in the estate, and, furthermore, having found that her claim to set aside those judgments is not time-barred, we hold that she presented evidence that she was entitled to a determination of her rights, and to reopen the estate, as she requested in her third-party complaint. Therefore, the trial court erred in entering summary judgment on her claim. Because the entire record is before this Court, even though an appeal was not taken from the other judgments, in the interest of judicial economy, we will now address those rights rather than remand the cause to the trial court.

The law concerning the right of an illegitimate child to inherit through intestate succession has seen many changes over the years. At common law, an illegitimate child, who had not been legitimated, was considered the child of no one and could inherit from no one. See *Williams v. Witherspoon*, 171 Ala. 559, 55 So. 132 (1911). The courts considered an illegitimate child "*nullius filius*," the "heir to nobody," and thus, the child "ha[d] no ancestor from whom any inheritable blood [could] be derived." *Lingen v. Lingen*, 45 Ala. 410, 413 (1871) (quoting 1 Wendell's Blackstone, 459).

By 1929, in the case of *Moore v. Terry*, 220 Ala. 47, 124 So. 80 (1929), overruled in part by *Everage v. Gibson*, supra, this Court had recognized that an illegitimate child, who had not been legitimated, could inherit from his mother, but not from his father, even if paternity was shown. This change was also reflected in Code 1940, Tit. 16, § 6, which provided that "[e]very illegitimate child is considered as the heir of his mother, and inherits her estate in whole or in part, as the case may be, in like

manner as if born in lawful wedlock." Later, in *Hudson v. Reed*, 259 Ala. 340, 66 So. 2d 909 (1953), this Court described the common law rule as a "harsh rule," and held that an illegitimate child, because of this statute, could inherit not only *from* his mother but also *through* his mother.

Between 1929 and 1979, however, the law in Alabama recognized only the following two methods by which an illegitimate child could be legitimated in order to inherit from its father through intestate succession: 1) by marriage of the parents, accompanied by the father's recognition of the child; or 2) by a written declaration, attested by two witnesses, and filed with the judge of probate.[19]

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[19] It is quite possible that the 1952 custody and support agreement would have been sufficient to legitimate Stone if Stewart, the child's mother, or other parties, including the State of Alabama, had attempted to utilize this method. Code 1940, Tit. 27, § 11, in effect at the time of Stone's birth, provided specifically as follows:

> "The father of a bastard child may legitimate it, and render it capable of inheriting his estate, by making a declaration in writing, attested by two witnesses, setting forth the name of the child proposed to be legitimated, its sex, supposed age, and the name of the mother, and that he thereby recognizes it as his child, and capable of inheriting his estate, real and personal, as if born in wedlock; the declaration being acknowledged by the maker before the judge of probate of the county of his residence, or its execution proved by the attesting witnesses, filed in the office of the judge or probate, and recorded in the minutes of his court, has the effect to legitimate such child."

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See *Moore*, 220 Ala. 47, 124 So. 80 (1929); see also Code 1923, §§ 9299, 9300, later codified at Code 1940, Tit. 27, §§ 10, 11, and Code 1975, §§ 26-11-1, 26-11-2.

Additionally, there were statutes in effect at the time of Stone's birth that provided that a father of an illegitimate child could be required to support the child, even though there had been no formal adjudication of paternity. See Code 1940, Tit. 34, §§ 89, 90. Under these provisions, a charge of nonsupport against the putative father could be sustained, even if he had not been adjudicated the father, if the putative father had publicly acknowledged or treated the child as his own in a manner to indicate his voluntary acknowledgement of parenthood. See *Law v. State*, 238 Ala. 428, 191 So. 803 (1939). These statutes evidence the policy of the law to compel the father of an illegitimate child to support that child if the father had *voluntarily acknowledged his parenthood*, as Hank Williams did here.[20]

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Normally, any agreement would have been filed before the father's death, but the statute was not so limited.

[20] We recognize that there is no Alabama case law on the issue of whether a purely contractual obligation to pay child support survives the death of the obligor; however, some jurisdictions, even at the time of Stone's birth, had held that death did not terminate a voluntary contractual obligation made by the decedent to pay child support, such as that made in the present case. We need not decide in this case whether a *court-ordered* obligation to pay child support survives the death of the obligor; however, we do hold that an agreement to pay child support, such as that involved in this case, that is purely

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After the United States Supreme Court decided the cases of *Trimble v. Gordon*, 430 U.S. 762 (1977), and *Lalli v. Lalli*, 439 U.S. 259 (1978),[21] Alabama's law concerning the right of an illegitimate child to inherit from its father changed dramatically. In *Trimble*, 430 U.S. 762 (1977), the Court found an Illinois statute, much like Alabama's Code 1975, §§ 26-11-1 and 26-11-2, which set forth the

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contractual and voluntarily entered without judicial compulsion, does not lose its enforceability at the death of the obligor, unless otherwise expressed.

We note, in particular, the following cases:

1) *In re Cirillo's Estate*, 114 N.Y.S.2d 799 (Queens Sur. 1952), in which the court, settling an account against the estate of the deceased, held that while generally a child support obligation ends with the death of the parent, the deceased's agreement to make support payments as long as his responsibility for the support of the illegitimate child existed under the law indicated that he intended to bind his estate beyond his death; and

2) *Stumpf's Appeal*, 116 Pa. 33, 8 A. 866 (1887), in which the court reversed a judgment disallowing the plaintiff's claim against the putative father's estate and held that there was nothing in the support agreement to indicate an intention by the obligor to limit his obligation to support his illegitimate child to his lifetime only and that the evidence showed that the purpose of the agreement was to save the mother from the expenses of rearing the child, and thus, the contract was continuing and binding on the decedent's estate.

See also, Annot., *Validity and Construction of Putative Father's Promise to Support or Provide for Illegitimate Child*, 20 A.L.R. 3d 500, 540 (1968).

[21] Of course, the rights of illegitimates to equal protection had been decided in *Levy v. Louisiana* in 1968.

two methods of legitimation discussed above, to be unconstitutional under an equal protection challenge. The Court stated the following:

> " 'The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual – as well as an unjust – way of deterring the parent.' "

Trimble, 430 U.S. at 769 (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)). In *Lalli*, 439 U.S. 259 (1978), the United States Supreme Court upheld, as constitutional, a similar New York statute because it provided that an illegitimate child could inherit from its father if there had been a judicial determination of paternity before the father's death.

In *Lalli*, Mr. Justice Powell, while recognizing, however, the importance of the competing state interest in the just and orderly administration of decedents' estates, stated as follows:

> "The primary state goal underlying the challenged aspects of § 4-1.2 is to provide for the just and orderly disposition of property at death. We long have recognized that this is an area with which the States have an interest of considerable magnitude. *Trimble*, [430 U.S. 762 (1977)] at 771; *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. at 170; *Labine v. Vincent*, 401 U.S. at

538; see also *Lyeth v. Joey*, 305 U.S. 188, 193 (1938); *Merger v. Grima*, 8 How. 490, 493 (1850).

"This interest is directly implicated in paternal inheritance by illegitimate children because of the peculiar problems of proof that are involved. Establishing maternity is seldom difficult. As one New York Surrogate's Court has observed: '[T]he birth of the child is a recorded or registered event usually taking place in the presence of others. In most cases the child remains with the mother and for a time is necessarily reared by her. That the child is the child of a particular woman is rarely difficult to prove.' *In re Ortiz*, 60 Misc.2d 756, 761, 303 N.Y.S.2d 806, 812 (1969). Proof of paternity, by contrast, frequently is difficult when the father is not part of a formal family unit. 'The putative father often goes his way unconscious of the birth of a child. *Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother.* Indeed the mother may not know *who* is responsible for her pregnancy.' Ibid. . . .; accord, *In re Flemm*, 85 Misc.2d 855, 861, 382 N.Y.S.2d 573, 576-577 (Surr.Ct. 1975); *In re Hendrix*, 68 Misc.2d, at 443, 326 N.Y.S.2d, at 650; cf. *Trimble*, supra, at 770, 772."

439 U.S. at 268-69 ("who" emphasized in original; other emphasis added).

Further, Mr. Justice Powell quoted extensively from *In re Flemm*, 86 Misc.2d 855, 381 N.Y.S.2d 573 (N.Y. Sur. 1975), as follows:

" 'An illegitimate, if made an unconditional distributee in intestacy, must be served with process in the estate of his parent or if he is a distributee in the estate of the kindred of a parent . . . . And, in probating the will of his parent (though not named a beneficiary) or in

> probating the will of any person who makes a class disposition to "issue" of such parent, the illegitimate must be served with process. . . . How does one cite and serve an illegitimate of whose existence neither family nor personal representative may be aware? And of great concern, how achieve finality of decree in *any* estate when there always exists the possibility however remote of a secret illegitimate lurking in the buried past of a parent or an ancestor of a class of beneficiaries? Finality in decree is essential in the Surrogates' Courts since title to real property passes under such decree. Our procedural statutes and Due Process Clause mandate notice and opportunity to be heard to all necessary parties. *Given the right to intestate succession, all illegitimates must be served with process. This would be no real problem with respect to those few estates where there are "known" illegitimates. But it presents an almost insuperable burden as regards "unknown" illegitimates.* The point made in the [Bennett] commission discussions was that instead of affecting only a few estates, procedural problems would be created for many – some members suggested a majority – of estates.' 85 Misc. 2d, at 859, 381 N.Y.S.2d, at 575-576."

439 U.S. at 270 (emphasis added).

Recognizing a different view in *Pickett v. Brown*, 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372 (1983), the United States Supreme Court, in holding a Tennessee statute of limitations involving illegitimate children unconstitutional, stated:

> *"In view of the history of treating illegitimate children less favorably than legitimate ones, we have subjected statutory classifications based on illegitimacy to a heightened level of scrutiny.* Although

we have held that classifications based on illegitimacy are not 'suspect,' or subject to 'our most exacting scrutiny,' *Trimble v. Gordon*, [430 U.S. 762 (1977)], at 767; *Mathews v. Lucas*, 427 U.S., at 506, the scrutiny applied to them 'is not a toothless one. . . .' Id., at 510. In *United States v. Clark*, [445 U.S. 23 (1980)], we stated that 'a classification based on illegitimacy is unconstitutional unless it bears "an evident and substantial relation to the particular . . . interest [the] statute is designed to serve." ' 445 U.S., at 27. See also *Lalli v. Lalli*, [439 U.S. 259 (1978)], at 265 (plurality opinion) ('classifications based on illegitimacy . . . are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests'). We applied a similar standard of review to a classification based on illegitimacy last Term in *Mills v. Habluetzel*, 456 U.S. 91 (1982). We stated that restrictions on support suits by illegitimate children 'will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest.' Id., at 99.

"Our decisions in *Gomez* [*v. Perez*, 409 U.S. 535 (1973)] and *Mills* are particularly relevant to a determination of the validity of the limitations period at issue in this case. In *Gomez* we considered 'whether the laws of Texas may constitutionally grant legitimate children a judicially enforceable right to support from their natural fathers and at the same time deny that right to illegitimate children.' 409 U.S., at 535. We stated that 'a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally,' id., at 538, and held that 'once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a

> child simply because its natural father has not married its mother.' Ibid. *The Court acknowledged the 'lurking problems with respect to proof of paternity,' ibid., and suggested that they could not 'be lightly brushed aside.' Ibid. But those problems could not be used to form 'an impenetrable barrier that works to shield otherwise invidious discrimination.'* Ibid." (Emphasis added.)

462 U.S. at 8-9.

Consequently, in 1979, this Court, in the case of *Everage v. Gibson*, 372 So. 2d 829 (Ala. 1979), cert. denied, 445 U.S. 931 (1980), in order to avoid finding Alabama's statutory scheme for intestate succession unconstitutional, construed it to include a third method of legitimation, i.e., a judicial determination of paternity made within two years of birth and during the father's lifetime. The *Everage* Court gleaned this third method from the child support statutes found at Code 1975, § 26-12-1 et seq. In 1982, the Alabama legislature superseded *Everage* and wrote this procedure into the Probate Code itself, in § 43-8-48, which provides that an illegitimate child is considered to be the child of the father if the parents marry or if paternity is established by an adjudication before the death of the father or *thereafter by clear and convincing proof.*[22] Then, in addition, in 1984, the

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[22] While not at issue in the present case, it is worth noting that the comments to this section expressly state that there is no time limitation in which to bring an action for paternity under this section because the drafters had serious reservations about the constitutionality of the former two-year limitations period adopted in *Everage*, and rightfully so. See *Abrams v. Wheeler*, 468 So. 2d 126 (Ala. 1985) (which recognized that the two-year limitations period in *Everage* was unconstitutional).

legislature repealed Code 1975, § 26-12-1 et seq., and replaced those sections with the Alabama Uniform Parentage Act, found at Code 1975, § 26-17-1 et seq. Like the child support statutes it replaced, the AUPA sets forth a mechanism whereby a judicial determination of paternity can be made. Therefore, there are presently two statutory schemes for judicial determination of paternity, one in the Probate Code and one in the AUPA.

Under the law as it exists today, there can be no question that where, as in this case, paternity has been established by clear and convincing evidence,[23] the law

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[23] For the purpose of clarity, we briefly recap the evidence that compelled the trial court's finding of paternity that is now undisputed in this case: 1) the 1952 custody and support agreement, that was drafted by Williams's attorney, refers to Hank Williams throughout as the "father" of the child; 2) the 1952 agreement, itself, requires a relinquishment by the mother of virtually all rights in the child to Hank Williams; 3) the 1952 agreement provided that the mother be given a one-way plane ticket to California, and that the child live with Lillian Stone, Williams's mother, for two years, during which time he would fully support the child; 4) the 1952 agreement provided that at the age of 3, the child "was to live with him [Hank Williams] continuously and be wholly and completely supported for by him, and cared for by him" (it is interesting to note that at the time this agreement was drafted, Williams, Jr., did not live with his father, but rather, lived in Tennessee with his mother, Audrey Williams; it appears, then, that Hank Williams attempted to provide the opportunity for closer parent-child relationship with Stone, who was to live with him, than that being enjoyed by his other child); 5) Lillian Stone, Irene Smith, and other family members acknowledged and publicly held the child out as the daughter of Hank Williams; and 6) the records of the Montgomery County Department of Public

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recognizes the right of the child to inherit through intestate succession. In brief response to the argument that Stone is barred from establishing her rights in the estate by operation of the doctrines of res judicata and collateral estoppel, we note the following. First, with regard to the issue of Stone's paternity, it is clear from the record that this issue was not adjudicated in the 1967 and 1968 proceedings. The court stated that it "[did] not believe that it [was] necessary to make this . . . determination." Furthermore, the issue of Stone's paternity was not appealed to this Court, and therefore, no arguments concerning the issue of her paternity are material. Finally, as for the issues regarding Stone's rights that were adjudicated in the 1967 and 1968 proceedings, the fact that those determinations were influenced by legal fraud on the court renders the doctrines of res judicata and collateral estoppel inapplicable, especially in this case, which involves the illegitimate child's right to share in the proceeds of copyright renewals that admittedly would have been payable to her as an illegitimate had her paternity not been concealed. See Code 1975, § 43-8-48; and *Cotton v. Terry*, 495 So. 2d 1077 (Ala. 1986). We recognize that the law at the time of her father's death had not yet recognized the third method of legitimation for the purpose of

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Welfare repeatedly document that Stone's natural father was Hank Williams. Therefore, unlike many cases in which the alleged father denies paternity and wishes to have nothing to do with the child, this is a case in which the father not only wished to accept responsibility for the child, but convinced the mother to give the child up, so that it might live with him and be reared by him.

intestate succession, i.e., a judicial determination of paternity; however, we also recognize that the law as it existed at that time has since been found to be unconstitutional by the United States Supreme Court in *Trimble v. Gordon*, 430 U.S. 762 (1977), and by this Court in *Everage v. Gibson*, 372 So.2d 829 (Ala. 1979).

In an action, such as the present one, that is not time-barred and is properly before this Court, we are bound to apply a constitutional law as it exists at the time the appeal is heard. This situation has been addressed by this Court and the Court of Civil Appeals in the cases of *Cotton v. Terry*, 495 So. 2d 1077 (Ala. 1986); *Abrams v. Wheeler*, 468 So. 2d 126 (Ala. 1985); and *Free v. Free*, 507 So. 2d 930 (Ala.Civ. App. 1986).

In *Cotton*, 495 So. 2d 1077 (Ala. 1986), an illegitimate child brought an action to establish paternity under Code 1975, § 43-8-48(2)(b), 11 years after the death of the alleged father. In construing § 43-8-48(2)(b), this Court held:

> "It may be seen from the plain language of the statute that paternity of an illegitimate child may be established *after the death of the father* through an adjudication supported by clear and convincing evidence. *When so established, such a child may inherit from the father through intestate succession.*" (Second emphasis added.)

Cotton, 495 So. 2d at 1079. In *Cotton*, as in the present case, there was clear evidence that the alleged father recognized the child as his and held himself out as the child's father. Yet, in *Cotton*, as in the present case, the law at the time of the alleged father's death would not have recognized the child as an heir. Even so, this Court

did not apply an unconstitutional law to the parties, but, rather, applied the law as it existed at the time of the appeal. Also, in *Abrams v. Wheeler*, 468 So. 2d 126 (Ala. 1985), an illegitimate child brought a paternity action before the death of the father, but after the expiration of the two-year limitations period that had been adopted in *Everage*, 372 So. 2d 829 (Ala. 1979). However, this Court refused to apply the two-year limitations period because it had since been found to be unconstitutional. Instead, it applied the law as it existed at the time of the appeal, and found the action not time-barred. Again, in *Free v. Free*, 507 So. 2d 930 (Ala.Civ. App. 1986), an illegitimate child brought an action under § 43-8-48(2)(b), not only after the death of the father, but also 20 years after the child had reached the age of majority. Despite the arguments by the legitimate heirs, the Court of Civil Appeals refused to apply the law in effect at the time of the death of the father or at the time of the birth of the child because that law had since been found unconstitutional.[24]

To the extent that there remains a question of the effect of a subsequent adoption on the right to establish paternity, we address that issue briefly. Code 1975, § 43-8-48(1), part of the Probate Code, states:

> "An adopted person is the child of an adopting parent and not of the natural parents . . . ."

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[24] While the paternity action is not an issue in the present case, it is interesting to note that Stone brought this action to set aside the former judgments and to declare her rights in her natural father's estate within 11 years after reaching the age of majority, which compares favorably with the delay in *Cotton*, 495 So. 2d 1077 (Ala. 1986), and *Free*, 507 So. 2d 930 (Ala. Civ. App. 1986).

In addition, Code 1975, § 26-17-6(e), part of the Alabama Uniform Parentage Act, provides:

> "If the child has been adopted, an action [to establish paternity under this section] may not be brought."

The trial court in the 1968 proceedings was erroneously of the opinion that the fact that Stone had twice been adopted acted as a bar to her recovery under the predecessors to these statutes. The crucial fact that the trial court failed to recognize in this case was that Stone had not been adopted at the time of her natural father's death. Therefore, any right that she had to inherit from his estate would have vested *at the time of his death* and would not have been affected by her subsequent adoption some two years later.

We do not believe that, in drafting these statutes, the legislature intended to cut off the right of an "after-adopted" child to inherit from its natural parent's estate.[25] Construing these statutes liberally, in order to further the trend of ameliorating the "harsh rule" of the common law, which had been overturned in 1968 by the United States Supreme Court, and which had been criticized by this Court and by the trial court in 1968, we believe that these statutes are to be read to protect, rather than cut off, an "after-adopted" child's right to inherit

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[25] In fact, in 1954, at the time of Stone's adoption, Alabama's law provided specifically that "[n]othing in this chapter dealing with adoption shall be construed as debarring a legally adopted child from inheriting property from *its natural parent or other kin.*" Code 1940, Tit. 27, § 5. (Emphasis added.)

from its natural parents. We hold, therefore, that because Stone had not been adopted at the time of her natural father's death, her rights in his estate had already vested, and, therefore, these statutes do not apply.[26]

Relief Granted

We have noted throughout this opinion the unique character of this case. In fashioning an appropriate remedy, we again take these peculiar circumstances into consideration.

This Court is ever mindful of the policy concerns surrounding the finality of judgments. At the same time, we cannot ignore the pleas for relief of an innocent party who has labored under judgments procured by legal fraud and suppression, and based upon a completely erroneous view of the applicable law, at a time when she was not only a minor but had no one except a guardian ad litem fighting for her rights, and he was effectively foreclosed from establishing them.

We further recognize that when an illegitimate child and a decedent's estate are involved, as is the case here, the law must protect two additional state interests – the right of the illegitimate child to inherit on a par with any legitimate children, and the important state interest in the just and orderly disposition of the decedent's estate.

We also recognize that

> " 'where the rights and obligations of the parties are necessarily blended in the judgment, and are

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[26] It should be apparent that the time lapse approved in this case may not be approved in other factual settings.

> thus dependent one upon the other, though they be not strictly joint, the appellate court will render such judgment as will permit and require the entire controversy to be settled in one proceeding, in which the rights and liabilities of all parties may be considered and consistently determined.' "

City of Tuscaloosa v. Fair, 232 Ala. 129, 136-37, 167 So. 276, 282 (1936), overruled in part on other grounds by *Jacks v. City of Birmingham*, 268 Ala. 138, 105 So.2d 121 (1958) (quoting *North Alabama Traction Co. v. Hays*, 184 Ala. 592, 596 64 So. 39, 40 (1913). In view of all of the evidence in this case relating to concealment by the attorney and the administratrix of the estate of Stone's claims to the estate and of facts material to those claims, in addition to the fact that the state agencies involved, as well as the court itself, failed to protect her rights, we cannot but conclude that equity and justice require that the 1967 and 1968 decrees rendered in this matter be set aside, in part. Accordingly, in order to balance all of the equities involved in this case, we hereby reverse the summary judgment on Stone's third-party claim in which she asked that the estate be reopened, and we order that the 1967 and 1968 judgments rendered in this matter be set aside, in part, and that Stone is entitled to receive her proportionate share of any proceeds of the estate of her natural father, Hank Williams, including any income or interest, and of any copyright royalties, but prospectively only, from the date that she gave notice of her claim, August 5, 1985. The trial court's judgment which, insofar as it denied her request for punitive damages against the third-party defendants, is affirmed.

While we find that the third-party defendants' sureties, Gulf American and American States, are not liable on Stone's fraud claim, their contractual liability arising out of the surety bond issued for this estate is a matter that remains to be determined by the trial court on remand.

The judgment of the trial court, insofar as it denied Stone's first claim for relief, is reversed, and this cause remanded for a full hearing and settlement, in a manner consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Hornsby, C.J., and Jones, Adams, and Steagall, JJ., concur.

Almon and Shores, JJ., dissent.

Houston and Kennedy, JJ., recused.

Catherine Yvonne Stone v. Gulf American Fire and Casualty Co., et al.

SHORES, JUSTICE (dissenting).

While I share my brothers' sympathy for the appellant, I cannot overlook the fact that every rule of law extant at every critical time in her life is against her position. Illegitimates could not inherit from their fathers at the time her father died (1953). They could not inherit at the time his estate was litigated in 1967 and 1968 when the Circuit Court of Montgomery County entered its final judgments to that effect. No appeal was taken from those final judgments.

The majority suggests that this Court might have changed the law had the guardian ad litem appealed the

1968 judgment. That assumption is speculation at best, but to give the appellant the benefit of that guess all of these years later is unprecedented.

The majority permits the appellant to challenge final judgments after approximately 17 years and more than 11 years after she reached majority in 1974, and would permit her to reopen the estate of her father, dead now for more than 36 years. All of this is permitted more than a decade and a half after a guardian ad litem appointed to represent her interests apparently concluded that he had discharged the duties of his office.

When are judgments final? The majority does not say. It attempts to temper its assault on the finality of these judgments by permitting the appellant to share in only a part of the decedent's estate: royalties paid since August 5, 1985, forward. Apparently, then, even the majority is unprepared to give the appellant full status as an heir to Hank Williams's estate. Apparently, she takes no interest in any real estate he may have had. She is allowed to participate in royalties payable only after August 5, 1985. Presumably, had Hank Williams's estate consisted of liquidated assets only, she could not have prevailed. I have never before heard of one's legal status as an heir turning on the nature of the assets of the estate. Not surprisingly, the majority cites no authority for its holding.

Because I feel bound to apply the law to these facts, sad though they are, I am compelled to dissent.

Almon, J., concurs.

APPENDIX H-2

Stone v. Gulf American Fire & Cas. Co., et al.

On Application for Rehearing

(Released Nov. 9, 1989)

MADDOX, JUSTICE.

Both Irene Smith and Jones, Murray and Stewart, P.C., have asked this Court to clarify its original opinion and to state that the summary judgments granted to them insofar as they denied Stone's request for damages against them are affirmed. Stone has again requested (1) that this Court reverse the trial court's summary judgment on her fraud claims against third-party defendants Smith and Jones, Murray and Stewart, and (2) that this Court modify its opinion to allow her to share in the estate of Hank Williams, Sr., from the date of his death in 1953, rather than from the date on which she made a demand on Hank Williams, Jr., in 1985.

In a brief styled "Petition of Randall Hank Williams for Leave to Appear for Purpose of Seeking to Vacate and Modify Opinion of July 5, 1989 and for Stay of Issuance of Certificate of Judgment Pending Further Proceedings," Williams, Jr., asks this Court to vacate and modify its original opinion on the ground that he was not a party to the appeal, and, therefore, that his due process rights were violated. Williams, Jr., argues that because Stone appealed only from the summary judgment granted on her third-party claim, she is barred by the doctrine of *res judicata*, because she did not appeal the summary judgment granted to him on his claim that she was not an

"heir." In short, Williams, Jr., claims that even though Stone has shown that she is the natural child of Hank Williams, Sr., and even if that determination in her favor was not appealed by him, she is now barred from inheriting because she did not appeal the adverse determination by the trial court that she was not an "heir," even though she has been judicially determined to be a natural child.

As set forth in the our [sic] original opinion, Williams, Jr., initiated this action by filing a declaratory judgment action seeking a declaration that Stone had no entitlement to Hank Williams's estate. Stone filed a counterclaim against Williams, Jr., and alleged that she was the natural daughter of Williams, Sr. Williams, Jr., joined issue on that claim.

Stone later filed a third-party complaint against Smith; Jones, Murray and Stewart, P.C.; and several fictitiously named parties, asking that the estate be reopened; she also asked for compensatory and punitive damages against third-party defendants Smith and Jones, Murray and Stewart, P.C. Gulf American Fire & Casualty Company and American States Insurance Company were also named as third-party defendants. The trial court entered a "Partial Summary Judgment" for Williams, Jr., on his complaint and entered a "Partial Summary Judgment" against Stone on her counterclaim and on her third-party complaint, finding "that there remains a justiciable issue raised in the Complaint filed by the Plaintiffs where the Court is specifically asked to declare that Williams, Jr. is the sole child of Williams, Sr. . . . [and that] [t]his issue as framed by the Complaint is still factually disputed and on that issue Summary Judgment is not appropriate even

though it is conceded by the Court that such a determination would not affect the outcome of the other issues raised by the pleadings."

As the trial court stated in its order on October 26, 1987, Williams, Jr., throughout the proceedings, subsequent to the time when the court entered its "Partial Summary Judgment" on July 14, 1987, objected to the trial court's proceeding forward to determine Stone's paternity, and excepted to the Court's interpretation of the pleadings.[1]

---

[1] For a better understanding of the legal effect of the trial court's grant of "Partial Summary Judgment" and the continuance of the case for a determination of Stone's paternity, over the objection of Williams, Jr., we set out portions of the trial court's orders:

> "The instant suit was commenced by the Plaintiffs on September 10, 1985 by Complaint for Declaratory Judgment and Injunctive Relief. The Complaint was amended twice with the last amendment being filed on November 14, 1985. Stone filed her Counterclaim for Establishment of Paternity, Declaration of Rights and Imposition of Constructive or Resulting Trust on October 14, 1986. Her third party complaint was also filed on that date.
>
> "The issues raised by the motions for summary judgment presently before this Court are as follows:
>
> "Whether, because of her illegitimate status and her status as an adopted child, Stone is barred by applicable state law from now attempting to establish that she is an heir of the Williams, Sr. estate.
>
> "Whether Stone has ever been adjudicated to be a child of Hank Williams, Sr.

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"Whether, based upon the facts not now in dispute, the third party complaint states a cause of action upon which relief may be granted.

"* * * *

"Turning to the issue of the alleged status of Stone as the child (as opposed to legal heir) of Williams, Sr., it is clear from the record that there was never a judicial determination relative to the biological relationship between Stone and Williams, Sr. As the Court noted in 1967, it was not necessary for the Court to make such a determination in reaching its decision at that time as it was irrelevant. Thus, res judicata and collateral estoppel do not affect that question and it remains an issue of disputed fact between the parties.

"As to the third party claim filed by Stone, the Court is of the opinion that the main if not the entire thrust of the complaint revolves around an argued duty to disclose and the willful or fraudulent failure to do so. In 1953 Stone was not an heir to the estate of Williams, Sr., and she could not have been established as such under then existing law. If the existence of Stone had been made known to the Court by any of the third party defendants, it is assumed that the Court in adjudicating her claim would have applied the law as it then existed and would therefore have ruled that her claim was at that time invalid. The only obligation or duty that could be foreseeable in a situation such as exists in this case would be a requirement that the Third Party Defendants act in good faith according to the law of the State of Alabama as it existed at that time. The Court deems it unreasonable to impose upon them the duty to anticipate or foresee what the law should or might become in the future. At the time that the alleged

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fraudulent concealment purportedly occurred, a full disclosure to the Court or to interested third parties would have been superfluous. Therefore, the Court is of the opinion that the Third Party Complaint does not state a cause of action for which recovery can be had.

"It appears from the record and from a complete review of the proceedings in this case that the law requires that the Court enter a Partial Summary Judgment in this cause. The Court finds that there remains a justiciable issue raised in the Complaint filed by the Plaintiffs where the Court is specifically asked to declare that Williams, Jr. is the sole child of Williams, Sr. This issue as framed by the Complaint is still factually disputed and on that issue Summary Judgment is not appropriate even though it is conceded by the Court that such a determination would not affect the outcome of the other issues raised by the pleadings.

"Based on the foregoing it is therefore ORDERED, ADJUDGED, AND DECREED BY THE COURT AS FOLLOWS:

"The Motion for Summary Judgment filed herein by the Plaintiffs as it refers to the original Complaint is GRANTED as to all issues with the exception of whether or not the Defendant is the biological child of Williams, Sr.

"The Motion for Summary Judgment filed herein by the Plaintiffs as it refers to the Counterclaim is granted as to all issues.

"The Motions for Summary Judgment filed by the Plaintiffs and the Third Party Defendants as they relate to the Third Party Complaint are GRANTED on all issues.

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"Further proceedings in this cause are hereby set on the 25th day of August, 1987 at 10:00 a.m.

"DONE THIS THE 14TH DAY OF JULY, 1987.
"s/H. MARK KENNEDY
"CIRCUIT JUDGE"

On October 26, 1987, the trial judge entered a final judgment in the case, which held inter alia:

"Plaintiffs throughout these proceedings, subsequent to this Court's Order on Motions for Summary Judgment, have objected to this Court's proceeding forward and have excepted to the Court's interpretation of the state of the pleadings. Regardless of whether the question is framed as, is the Defendant the natural daughter of Williams, Sr., or is Williams, Jr. the only natural child, the court reiterates that the issue that remains before the court is the biological status of Defendant Stone. The court is of the opinion that that issue was raised by the Plaintiffs in the original Complaint, was joined by the Defendant, and now is a legitimate, justiciable issue.

"In lieu of making additional findings of fact, the Court adopts the findings as stated in the previous Orders of this Court. Based upon those findings and the additional evidence as submitted at the hearing of September 2, 1987, the court is of the opinion that it continues to have jurisdiction over the parties and of the subject matter and does hereby enter the Final Order.

"The Court upon consideration of the evidence does hereby find that Hank Williams, Jr. is not in fact the only natural child of Hank Williams, Sr. in that Defendant Catherine Yvonne Stone is also a natural child of Hank Williams, Sr."

Stone admittedly did not appeal the entry of the "Partial Summary Judgment"[2] entered in favor of Williams, Jr., on his complaint, and on Stone's counterclaim on July 14, 1987, likewise, Williams, Jr., did not appeal the adverse ruling that Stone was the natural child of Hank Williams, Sr., that was entered on October 26, 1987. Naturally, Stone did not appeal from the October 26, 1987, determination that she was the natural child of Williams, Sr., because it was favorable to her.

It is clear that the doctrine of *res judicata* does not apply in this situation, because that doctrine prohibits the *relitigation* of all matters that were or could have been litigated in a *prior* action. *Century 21 Preferred Properties, Inc. v. Alabama Real Estate Comm'n*, 401 So. 2d 764, 768 (Ala. 1981). Here, the complaint of Williams, Jr., and Stone's counterclaim and third-party complaint were litigated together.

As the trial court found, the main thrust of Stone's third-party claim involved "an argued duty to disclose and the willful or fraudulent failure to do so." This Court, in its original opinion, found that there was a duty, that there was a breach of that duty, and that Stone was entitled to have the estate reopened, but was not entitled to any damages against the third-party defendants. Williams, Jr., in his petition before us, claims that Stone's third-party complaint was only for *indemnification* and that "Stone's request in her third-party complaint to reopen the estate was simply meaningless surplusage." We

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[2] In his petition before us, Williams, Jr., notes that the "Partial Summary Judgment" was "interlocutory and not subject to immediate appeal." See Rule 54(b), Ala. R. Civ. P.

cannot agree. On original deliverance, we considered whether summary judgment was appropriate on this third-party complaint, which contained claims that were both in personam and in rem. Although we did not elaborate on the issue, we necessarily determined that Stone's request to have the estate reopened was an action in rem.[3] Additionally, this Court, on another appeal in this case, treated the original declaratory judgment action filed by Williams, Jr., as one filed pursuant to the provisions of Ala. Code 1975, § 6-6-225. In *Ex parte Stone*, 502 So. 2d 683 (Ala. 1986), this Court stated the following concerning the nature of the underlying declaratory judgment action:

> "Further support for the trial court's refusal to dismiss the Williams Group's complaint can be found in *Code of Alabama, 1975*, § 6-6-220, *et seq.*, the Declaratory Judgment Act. Specifically, § 6-6-225 provides:
>
> > " 'Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin or cestui que trust in the administration of a trust or of the

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[3] In 1A C.J.S. *Actions* § 4 (1985), pp. 309-10, it is said:

> "As its name implies, an action in rem is an action or proceeding against a 'thing' or property, instead of a person; a proceeding to determine the state or condition of the thing itself; a judicial proceeding against the thing itself, which terminating in a valid judgment binds all the world. It has been said, however, that an action or proceeding in rem is difficult to define with accurate completeness, its exact nature being best understood by reference to its essential features."

> estate of a decedent, infant, incompetent or insolvent may have a declaration of rights or legal relations in respect thereto:
>
> " '(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or other;
>
> " '(2) To direct the executors, administrators or trustees to do or abstain from doing any particular act in their fiduciary capacity; or
>
> " '(3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.'
>
> "The instant dispute plainly falls within the scope of this statute, and the declaratory judgment action filed by the Williams Group is thus a viable means of settling this dispute."

502 So. 2d at 686.

Stone's claim in her third-party complaint, in which she seeks to reopen the estate, is not essentially different from the prayer of Williams, Jr., for relief in his declaratory judgment action, wherein he specifically asked:

> "That in the event this Court *alters, modifies or otherwise changes the prior Orders and Judgments* in Civil Action Nos. 25,056 and 27,960 that this Court proceed to adjudicate and determine the rights of the parties hereto with regard to the Estate of Hiriam Hank Williams and the copyright and renewal copyright renewal copyright [sic] interests of the musical compositions of Hiriam 'Hank' Williams."

To apply the principles of *res judicata* or of collateral estoppel in this case would be most inequitable, and

would violate the spirit of both Rule 1, A.R.Civ.P. and Rule 1, A.R.App.P., and would elevate form over substance. It is clear that both the complaint of Williams, Jr., and Stone's third-party complaint asked for a determination of Stone's right to share in the estate. As we indicated in our original opinion, the claims of the various parties in this case are so intertwined and the factual situation is so unique that notions of fairness require that the entire controversy be settled in one proceeding.[4] See *City of Tuscaloosa v. Fair*, 232 Ala. 129, 167 So. 276 (1936), overruled in part on other grounds by *Jacks v. City of Birmingham*, 268 Ala. 138, 105 So. 2d 121 (1958). Stone did indeed appeal a judgment that held that she was not entitled to have the estate reopened. She convinced this Court that the record in this case showed that she was, in fact, entitled to have the estate reopened. To say that she was barred from raising her claims on that appeal because she did not also appeal a simultaneous judgment with the same holding would be unfair under *City of Tuscaloosa v. Fair* and the spirit of the Alabama Rules of Civil Procedure.[5]

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[4] It is perfectly clear that the judgment of the trial court on the declaratory judgment action and on the third-party complaint was premised upon an erroneous determination by the trial court that even if Stone was a natural child of Williams, Sr., she was not an "heir."

[5] The July 14, 1987, judgment of the trial court adjudicated all claims of the parties except Stone's claim that she was a natural child of Williams, Sr. Williams, Jr., strongly resisted the trial court's jurisdiction to make the subsequent finding. Also, it should be remembered that the trial court granted the third parties' motion for a *summary judgment*, and although the

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Even though we hold that the third-party action seeking to reopen the estate was in rem and that Williams, Jr., essentially asked for the same relief in the original declaratory judgment action that Stone requested in her third-party complaint, we, nevertheless, have carefully considered the argument of Williams, Jr., that, because Stone did not appeal the summary judgment entered in favor of him on his declaratory judgment complaint, this Court should not have determined, on this appeal, whether Stone was entitled to have the estate reopened and to share in the estate because he was not a party to the appeal.

This Court, on original submission, carefully considered whether it should allow this estate to be reopened. The dissenting Justices were of the opinion that we should not permit it to be reopened. On original deliverance, we noted "throughout [the] opinion the unique character of this case," and that "[i]n fashioning an appropriate remedy, we [took] these peculiar circumstances into consideration."

Although the judgments appealed from were summary judgments, there was voluminous evidence presented, much of which we took into consideration in fashioning

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judgment was not specifically made final and appealable pursuant to the provisions of Rule 54(b), Ala.R.Civ.P. (it was denominated a "Partial Summary Judgment" by the trial court), it would not be in keeping with the spirit of the Alabama Rules of Civil Procedure to hold that Stone would now be precluded from sharing in the estate, especially when Williams, Jr., specifically asked that Stone's claim be adjudicated pursuant to Ala. Code 1975, § 6-6-225.

our order on original deliverance. The basic facts upon which our legal determination was made were not disputed; therefore, we were presented with questions of law, considering those admitted facts. As the original opinion shows, this Court carefully considered the rights of individuals, including petitioner Williams, Jr., who had relied upon the prior decrees that this Court held were due to be set aside, and our judgment was not unanimous; there were dissenting views.

On application for rehearing, we have carefully considered Stone's argument that we should allow the estate to be reopened from the beginning, and we have considered very closely the argument of Williams, Jr., that we should not let Stone share at all, even though she has been judicially declared to be the natural daughter of Williams, Sr. We believe we reached a just and equitable result on original deliverance, and we are of the opinion that the petition of Williams, Jr., for leave to appear for the purpose of seeking to vacate and modify this Court's July 5, 1989, opinion is due to be denied. In reaching this conclusion, we apply the statutory principle in Code, 1975 § 12-22-70, which is merely declaratory of an appellate court's power, that "[t]he appellate court may, upon the reversal of any judgment or decree, remand the same for further proceedings or enter such judgment or decree as the court below should have entered or rendered, when the record enables it to do so." The record in this case allows us to do that, because the facts of the case have been fully developed in this record, and the evidence is either undisputed or without material conflict. In such a case, the general rule particularly applicable as

stated in 5B C.J.S. Appeal and Error § 1925 (1958), pages 425-27:

> "The general rule that the appellate court may, on reversal, render or direct final judgment is particularly applicable where the facts of the case have been fully developed on the trial, and there is nothing on which the party against whom reversal was made could strengthen his case or ground further proceedings, and it appears from the record that the evidence on another trial would be substantially unchanged."

Because we are of the opinion that Stone is not precluded by *res judicata* or collateral estoppel from having the estate reopened and because we believe that, based on the facts of this case, which were fully developed in this record and on the further fact that the position advanced by Williams, Jr., that Stone was not an "heir" was adequately presented by other parties on this appeal, and based on this Court's independent consideration of his position in view of the in rem nature of the proceeding, we cannot see how Williams, Jr., could strengthen his position on the law of this case. In fact, since original deliverance, we have located another case which appears to support the result we reached. The Supreme Court of Mississippi recently stated in *Collier v. Shell Oil Co.*, 534 So., 2d 1015, 1017 (Miss. 1988): "One who has acquired title by operation of law under prior interpretation of the law regulating descent and distribution must yield to a subsequent change of interpretation." See also *Reed v. Campbell*, 476 U.S. 852 (1986) (*Trimble v. Gordon*, 430 U.S. 762 (1978), can be applied retroactively).

Based on the foregoing, we deny the petition of Randall Hank Williams, Jr., and we overrule the application

for rehearing filed by Stone, and we affirm the entries of summary judgment for Smith and Jones, Murray, and Stewart, P.C., on Stone's claim for fraud.

PETITION OF RANDALL HANK WILLIAMS, JR., DENIED; APPLICATION FOR REHEARING BY STONE OVERRULED; OPINION EXTENDED; AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Jones, Adams, and Steagall, JJ., concur. Almon and Shores, JJ., dissent.

Hornsby, C.J., and Houston, and Kennedy, JJ., recused.

Catherine Yvonne Stone v. Gulf American Fire & Casualty Co., et al.

SHORES, JUSTICE (dissenting).

The majority excuses its disregard of the law by calling this a unique case, but it cannot escape the fact that Williams, Jr., won the controversy between him and Stone in the court below and that Stone did not appeal that judgment. That judgment became final, and it decided the issue of whether Stone could share in the estate of Hank Williams, Sr. As the *Restatement (Second) of Judgments* § 33 (1982) states:

> "A valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared, and, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action."

Stone appealed a judgment entered in her impleader action against certain other third parties. Williams, Jr.,

was not before this Court. Yet this Court has decided that Williams, Jr., now loses the case between him and Stone and by doing so refuses to follow all of the applicable substantive law pertinent to the issues and now disregards the procedural rules as well. If this case were not so unique, the issues between Williams, Jr., and Stone that were decided by a court of general jurisdiction in favor of Williams, Jr., would be settled forever because they are *res judicata*. As Professor Moore has written:

> "If an appeal is taken from only part of the judgment, the remaining part is res judicata, and the vacation of the portion appealed from and remand of the case for further proceedings does not revive the trial court jurisdiction of the unappealed portion of the judgment."

1B J. Moore, *Moore's Federal Practice* ¶0.404 (2d ed. 1988).

I think the Court's action violates the constitution of this state and the Constitution of the United States in that it directly affects property rights of Williams, Jr., that were vested, if not at the time the estate of Williams, Sr., was finally closed, then surely by the entry of final judgment in his favor in his declaratory judgment action, which this Court held was the proper way to finally determine whether Stone had an interest in the estate. As Professor Moore has said in commenting upon the failure of a court to give *res judicata* effect to binding prior orders:

> "The due process clause of the Fourteenth Amendment should preclude a state from subsequently restricting or refusing effect to one of its judgments as res judicata beyond a certain point. The reasons for this conclusion are: judicial rights were vested by the judgment; they

> may be divested by the usual judicial remedies of direct attack, and remedies to enjoin or otherwise obtain relief from the judgment; just as a party may not arbitrarily be bound by a judgment, so he may not arbitrarily be deprived of his rights under a valid judgment. And a state constitutional due process provision would similarly act as a check upon state power to deprive a party unjustly of vested rights in a judgment rendered by the state court."

1B J. Moore, *Moore's Federal Practice* ¶0.406 (2d ed 1988).

It has often been said that hard cases make bad law. This case demonstrates that unique facts can result in a disregard for all law.

Almon, J., concurs.

APPENDIX I-1

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

RANDALL HANK WILLIAMS, and WESLEY H. ROSE and ROY ACUFF, as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc., and Milene Music, Inc., both Tennessee corporations, Plaintiffs, V. CATHERINE YVONNE STONE, Defendant.	CASE NO. CV-85-1316-Ph
CATHERINE YVONNE STONE, Counter-Claimant V. RANDALL HANK WILLIAMS, Counter-Defendant.	
CATHERINE YVONNE STONE, Third Party Plaintiff, V. GULF AMERICAN FIRE & CASULATY COMPANY; AMERICAN STATES INSURANCE COMPANY; JONES, MURRAY & STEWART, P.C.; IRENE SMITH; THE ESTATE OF ROBERT B. STEWART; Third Party Defendants.	

CATHY STONE'S BRIEF IN RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT

Now comes Cathy Stone, by and through her undersigned attorneys, and in response to the motions for summary judgment filed by Randall Hank Williams, Wesley H. Rose and Roy Acuff as Trustees in Liquidation for the Stockholders of Fred Rose Music Inc. and Milene Music, Inc., Jones, Murray & Stewart, the Estate of Robert B. Stewart, Irene Smith, Gulf American Fire & Casualty Company and American States Insurance Company, states as follows.

STATEMENT OF THE CASE

a. *Randall Hank Williams, et al v. Cathy Stone.*

This is an action for declaratory judgment that Cathy Stone has no right or entitlement to any proceeds of the Estate of Hiriam Hank Williams (hereinafter "Williams Sr."). The action is brought by Randall Hank Williams, the alleged son of Hiriam Hank Williams, deceased, (hereinafter "Williams Jr."), and Wesley Rose and Fred [sic] Acuff as trustees in liquidation for the stockholders of Fred Rose Music Inc. and Milene Music, Inc., which corporations had acquired rights in the musical compositions of Williams Sr. (These plaintiffs will be collectively referred to as the "Williams Group"). The defendant is Cathy Yvonne Stone, who makes claims and assertions that she is the daughter of Williams, Sr., which have led to the filing of this action by plaintiffs.

The Williams Group specifically asks this Court to make the following determinations in this action.

1. Stone has never been adjudicated to be the child of Williams, Sr.

2. Stone is an adopted child (not by Williams Sr.) and is therefore barred by § 26-17-6-(e) Code of Alabama (1984) from establishing paternity.

3. Stone is barred by statute of limitations, laches, waiver and estoppel from now establishing paternity.

4. Court orders entered in The Matter of the Estate of Hiriam Hank Williams, Circuit Court of Montgomery County, Alabama, In Equity, Case No. 25,056 and The Matter of the Guardianship Estate of Randall Hank Williams, a minor, Circuit Court of Montgomery County, Alabama, In Equity, Case No. 27,960, are binding on Stone and bar her from now establishing paternity.

5. Randall Hank Williams is the sole child of Williams Sr.

These are essentially the same issues raised in the Motions for Summary Judgment now pending before the Court.

The original complaint by the Williams Group was filed on September 11 [sic], 1985, in the Circuit Court of Montgomery County, Alabama. It was subsequently amended, and Stone filed a motion to dismiss the Complaint and Amended Complaint on the ground that this Court did not have subject matter jurisdiction to determine her rights in the renewal copyrights of Williams Sr. The Williams Group filed a Second Amended Complaint which purported to remove the copyright interests from this action, and Stone filed a second motion to dismiss on the ground that there was no justiciable controversy. This motion was denied, and Stone filed a Petition for Writ of

Mandamus with the Alabama Supreme Court. On September 26, 1986, the Alabama Supreme Court denied the writ.

On October 11, 1986, Stone filed her answer to the Second Amended Complaint, demanding a jury trial and raising as affirmative defenses failure to state a claim for relief, lack of justiciable controversy, lack of subject matter jurisdiction to determine rights in renewal copyrights, the doctrine of unclean hands and estoppel. At the same time, Stone filed a Counterclaim.

b. *Cathy Stone v. Randall Hank Williams.*

This is the counterclaim to the action for declaratory judgment brought by the Williams Group. Stone requests that this Court enter a judgment of paternity that she is the daughter of Williams Sr. and is due her proportionate interest in the proceeds of the estate of Williams Sr. Further, she requests that the Court order Williams Jr. to account for all monies received from the estate, and that a constructive trust be imposed on Williams Jr. for all monies received from the estate. A demand for a jury trial was made.

Williams Jr. filed an answer to the Counterclaim and raised as affirmative defenses all those issues now raised in his Motion for Summary Judgment.

c. *Cathy Stone v. Gulf American Fire & Casualty Company, et al.*

This is the third party complaint filed by Stone within ten days of filing her answer and counterclaim above.

Named as third party defendants are Irene Smith (the administratrix of the estate of Williams Sr. from 1955 to 1969), the Estate of Robert B. Stewart (Robert Stewart having served as the attorney for the estate from 1953 until it was closed in 1975 and as the administrator of the estate from 1969 to 1975), Jones, Murray & Stewart (the partnership or professional corporation to which Robert Stewart was a member), Gulf American Fire & Casualty Company (the insurance company which bonded the administrators of the estate of Williams Sr.), and American States Insurance Company (the successor in interest of Gulf American Fire & Casualty Company).

In Count One of her Third Party Complaint, Stone alleges that Smith, Stewart, and Jones, Murray & Stewart through Stewart, committed fraud on the court from 1953 through 1967, by hiding the fact of her existence and relationship to Williams Sr. from the Montgomery County Probate Court and Circuit Court, thus precluding determination of her paternity and depriving her of opportunity to have her paternity adjudicated.

In Count Two, Stone alleges that all third party defendants had a special, confidential and fiduciary relationship with her and as a result of this relationship, there was a duty to disclose to her facts sufficient to evaluate and pursue her lawful interest in the Williams Sr. estate.

In Count Three, Stone alleges that all third party defendants engaged in a conspiracy to defraud her and the court, so that neither the court nor Stone could seek a determination of paternity and interest in the estate of Williams Sr.

Count Four is an action against the sureties only, for payment on the administrators' bond if Stone prevails against the administrators on any of the first three counts.

A jury trial was requested by Stone on her Third Party Complaint.

Gulf American and American States filed a motion to dismiss the third party complaint on the grounds that it fails to state a cause of action on which relief can be granted and that all claims against these third party defendants are barred by the statute of limitations. Jones, Murray & Stewart and the Estate of Robert B. Stewart filed answers to the third party complaint, raising as affirmative defenses the statute of non-claims (only as to the estate of Stewart), failure to state a claim upon which relief can be granted, laches, statute of limitations, collateral estoppel, res judicata, and waiver and estoppel. Irene Smith filed an answer to the third party complaint and raised the same defenses as Jones, Murray & Stewart.

All third party defendants and the Williams Group have filed motions for summary judgment. These motions are now pending before this Court.

STATEMENT OF THE FACTS

In Montgomery, Alabama, on October 15, 1952, Williams Sr. and Bobbie Webb Jett entered into a written, signed agreement that provided for custody and support of an unborn child Bobbie Jett was then carrying. Williams Sr. was unmarried on the date of the agreement. The agreement provided in part, (a) that Williams Sr. would pay room and board for Bobbie Jett until the birth

of the child; (b) that Williams Sr. would pay all doctor and hospital bills incurred in connection with the birth of the child; (c) that Williams Sr. would provide a one way plane ticket for Bobbie Jett from Montgomery to anywhere in California after the birth of the child; (d) that Bobbie Jett would receive $100.00 per month for life; and (e) that for the first two years after the child's birth, custody would be in Mrs. Lillian Stone, mother of Williams Sr., with Williams Sr. to pay all necessary expenses. It was further agreed:

> During said two year period, that the child is in the custody of Mrs. Stone, both the father, Hank Williams and the said Bobbie W. Jett shall have the right to visit said child at convenient and reasonable hours. Beginning at the third birthday of said child, its custody and control shall vest in the said Hank Williams and the child shall live with him continuously and be wholly and completely supported by him, and cared for by him, until it reaches its fifth birthday at which time the custody of the child shall be divided between both parties; that is, during the winter months or school months, the child shall remain with Hank Williams and during the summer months or school vacation months, the custody shall be in the mother. The responsibility for the support of said child shall be in Hank Williams both during the times when he has custody of the child and when it is visiting with the mother. During the time the child is in the custody of the father, Hank Williams, the mother shall have the right to visit it at reasonable times and at reasonable hours, during the time it is in the custody of the mother during the summer months, the father shall have the same privilege of visitation.

The agreement was further intended to forever terminate any claim Bobbie Jett might have against Hank Williams Sr. The last paragraph states:

> In view of the fact that the paternity of the said child is in doubt and is not to be in anyway construed as admitted by this agreement which is made solely because of the possibility of paternity, the said Bobbie W. Jett does hereby release to [sic] said Hank Williams from any and all further claims arising out of her condition or the birth of said child.

(The agreement is attached hereto as Exhibit 1)

The agreement was drafted by Robert B. Stewart, attorney, in the presence of Bobbie Jett, Mrs. Lillian Stone and Williams Sr. on October 15, 1952. The document was signed by Bobbie Jett and Williams Sr. on that date.

Hank Williams Sr. died intestate on January 1, 1953. Five days later, on January 6, 1953, Antha Bell [sic] Jett (now known as Cathy Stone) was born in Montgomery, Alabama to Bobbie Jett. By the agreement dated October 15, 1952, Bobbie Jett left her baby with Lillian Stone, the mother of Williams Sr., and left for California or Nashville.

On or about January 28, 1953, Lillian Stone spoke to the Montgomery County Department of Public Welfare about adopting the baby. She reportedly told the social workers that the "child is the daughter of Bobbie Webb Jett and that the father of the child is her son, Hank Williams, deceased." (Exhibit 2) Mrs. Stone repeatedly told friends that the baby's father was Williams Sr. (Depos. Neal McCormick, 3/17/86, p. 41; Depos. Christina Venable, p. 7-9; Depos. Robert Helton, 12/22/86, p. 47;

Depos. Connie Helton, 12/22/86, p. 63-64) Williams Sr. is reported to have told his mother face-to-face that Bobbie Jett's baby was his baby. (Depos. Robert Helton, 12/22/86, p.30; Depos. Connie Helton, 12/22/86, p. 43.)

On July 8, 1953, Lillian Stone and her husband filed a petition for adoption of Antha Belle Jett in the Probate Court of Montgomery County. (Exhibit 3) The Final Decree of adoption granting adoption of the child to Lillian Stone and her ex-husband (they were divorced after the filing of the adoption petition) was issued on December 23, 1954. (Exhibit 4)

During the adoption investigation, Irene Smith, sister of Williams Sr. was contacted by the social workers at her home in Virginia. She reportedly told the workers that "her deceased brother is the natural father" of Antha Belle Jett. (Exhibit 5) She willingly provided information about Williams Sr. to the County social workers without denying that he was the father of the baby. (Exhibit 6)

Lillian Stone died on February 26, 1955. Although Irene Smith had earlier promised the workers that she would take care of the child if anything happened to Mrs. Stone (Exhibits 5 and 7), she apparently had misgivings about her original promise and told the County workers that she felt the child would be better off if adopted by someone unrelated to the Williams/Stone family. (Exhibit 8) She had discussed these thoughts with Robert B. Stewart before her mother's adoption of the Jett child, telling him that it would be better for the child and its parents if they knew nothing of her origin at all. (Exhibit 9) Irene Smith also related to the workers that she did not believe her father, Mr. Stone, would be able to care for the baby

on his own. Mr. Stone evidently agreed that it would probably be best for the child to live with another family. (Exhibit 8)

On April 29, 1955, Catherine Yvonne Stone was adjudged to be a ward of the State of Alabama and was placed in a boarding home in the Montgomery area. (Exhibit 10) Exactly four years later, she was adopted by George and Mary Deupree. (Exhibit 11) The identities of her natural parents were not revealed to her or the Deuprees.

At the time Hank Williams Sr. died, he was survived by the following family members:

Lillian Williams Stone, his mother
Hiriam A. Williams, his father
Billie Jean Williams, his common law wife
Randall Hank Williams, his son
Irene Smith, his sister
Antha Bell [sic] Jett (Cathy Stone), his daughter

A petition for letters of administration was filed in January 1953, by Lillian Williams Stone in the Probate Court of Montgomery County, Alabama, for the estate of Williams, Sr. (Exhibit 12). Although the other heirs of Williams Sr. were named, Cathy Stone was not named or described in any way in the petition filed by Lillian Stone. Her identity and existence were not disclosed in any way to the Probate Court at that time.

At the time that the petition was prepared and filed, Lillian Stone and Robert B. Stewart, the attorney for the estate, were aware of the existence and identity of Cathy Stone.

Evidence of Stewart's knowledge includes the fact that he drafted the October 15, 1952 Agreement (Exhibit

1) between Williams Sr. and Bobbie Jett, wherein Williams Sr. is referred to as the "father" of the child carried by Bobbie Jett. (Exhibit 13) Further, in 1962, there was some correspondence between Robert Stewart and Harold Orenstein, attorney for the music publishers, which indicates that Robert Stewart believed Cathy Stone to be the daughter of Williams Sr. On February 28, 1962, Mr. Orenstein wrote to Mr. Stewart and suggested that a nominal payment be made to the minor, Cathy Stone, to forever cut her off from claiming any interest in the renewal copyrights by reason of her ancestery. (Exhibit 14) Mr. Stewart wrote back and advised against such a payment. (Exhibit 15) The renewal copyrights in issue were those on Williams Sr.'s songs. The child referred to in these letters is Cathy Stone, and the issue was how Cathy Stone's statutory rights to an interest in the copyright renewals could be cut off. The only statutory right to copyright renewals which could have been discussed were the rights of a child to the renewals on copyrights of her father. Copyright Act of 1947 (Title 17) § 24. Finally, in 1967, Robert Stewart, as attorney for Irene Smith, then administratrix of the Williams Sr. estate and the legal guardian of Williams Jr., filed two answers in the Circuit Court of Montgomery County, Alabama, in which he raises the possibility of other minors who may have an interest in the Williams Sr. estate. (Exhibit 16 and 17) The only minor ever discovered by Drayton Hamilton, appointed in 1967 as the guardian ad litem to represent "the interests of any other persons who may have an interest in or claim to the property or assets of the Williams Sr. estate or the copyrights of [sic] renewals", was "a girl child born to the said Bobbie W. Jett on or about . . .

January 6, 1953, in. . . .Montgomery, Alabama." (Exhibit 18, paragraph 1; Exhibit 19, paragraph 1) This "girl child" is Cathy Stone. (The answers filed in 1967 were in response to Petitions by Audrey Williams, the first wife of Williams Sr., who claimed that a contract between Irene Smith, as administratrix and guardian, and and [sic] Fred Rose Music, Inc. for the renewals of Williams Sr. copyrights and other property was void and due to be set aside.)

Drayton Hamilton had acted as the guardian ad litem for Cathy Stone in the Estate of Lillian Williams Stone in 1963. (Depos. Hamilton, 3/17/86, p. 21) However, he did not discover during that proceeding that Cathy Stone was the possible heir and child of Williams Sr. He only knew that she was an adopted child of Mrs. Lillian Stone. (Depos. Hamilton, 3/17/86, p. 26, 36) The first time Drayton Hamilton became aware of Cathy Stone's true identity was in 1967 or 1968, when he was appointed to serve as guardian ad litem. (Depos. Hamilton, 3/17/86, p. 27) He also testified that to his knowledge Cathy Stone's identity and existence had not been revealed to the court in the Williams Jr. guardianship case and the Williams Sr. estate case prior to his appointment. (Depos Hamilton, 3/17/86, p. 35)

The first time the Montgomery County Circuit Court was advised that Hank Williams Sr. may have had a child other than Hank Williams Jr., was in 1967, when Irene Smith filed her answers to the petitions of Audrey Williams. The child was more definitely identified by Drayton Hamilton, after he was appointed guardian ad litem in the estate of Williams Sr. and the guardianship estate of Williams Jr. Prior to that time, the court records are

void of any mention of Cathy Stone, or Antha Belle Jett, or "a girl child."

Subsequent to this revelation to the court, all parties engaged in fairly extensive discovery. The October 15, 1952, agreement (Exhibit 1) was produced by Robert Stewart and filed with the court, among other documents. Drayton Hamilton argued that this was a written declaration of paternity under Title 27, Section 11 (1940) which legitimated the child as the daughter of Williams Sr. In sum, his argument in the Williams Sr. Estate case was:

> We conclude that the Court must determine that the child, represented by your guardian ad litem, is the natural child of Hank Williams; secondly, that the said child is the legitimate daughter of Hank Williams under Alabama Law and the facts of the case; thirdly, that even if the child has not been legitimated she should share in the estate as the natural daughter of Hank Williams; and lastly, that there can be but little question that this child has a present right under the Copyright Laws of the United States to share in the income from the Hank Williams compositons [sic].

(Exhibit 20, p.12)

This was essentiallly [sic] the same argument made by the guardian ad litem in the guardianship case.

After completion of discovery, briefing on the issues, and a hearing lasting over one week, the Circuit Court of Montgomery County issued two orders, one in The Matter of the Estate of Hiriam Hank Williams and one in The Matter of the Guardianship Estate of Randall Hank Williams. The first order was issued by [sic] Honorable

Richard P. Emmet on December 1, 1967, in the Williams Sr. Estate case. That order, in pertinent part states:

> The pleadings, the testimony, and the exhibits raise the question of the right of another child to receive a part of the assets of this estate as a natural child which has been legitimated under Alabama's statutory procedure. The Guardian Ad Litem has also sought a determination by the Court that this child, even if not legitimated as required by statute, is a natural child of Hiriam Hank Williams, and as such may have certain rights under the Federal Copyright Statutes. The Court does not believe that it is necessary to make this latter determination.
>
> In the opinion of the Court, there has not been sufficient compliance with the requirements of Section 11 of Title 27 of the Code of Alabama to give the child in question any right of inheritance from Hiriam Hank Williams or to receive any part of his estate. The Court is further of the opinion that under all the evidence heard and considered by the Court, Randall Williams is the sole *heir and distributee* of the Estate of Hiriam Hank Williams.
>
> . . .
>
> IT IS, THEREFORE, CONSIDERED, ORDERED AND DECREED by the Court:
>
> . . .
>
> 2. That Randall Williams is the sole *heir* of his father, Hiriam Hank Williams, and is the only *beneficiary* of his estate now administered by this Court. (Emphasis added.)

(Exhibit 21)

The second order was issued by Judge Emmet in the guardianship estate of Williams Jr. on January 30, 1968, and it states in pertinent part:

> Addressing itself to the question of the child born to one Bobbie W. Jett, the Court finds from the evidence the child does not have any right in the copyrights or the renewal of those rights of the late Hiriam (Hank) Williams.
>
> . . .
>
> . . . By fiction of law only but with the same effect as if natural, the child has been infused with the blood of the adopting parents. The evidence shows the final decree of adoption occurred almost ten years ago . . .
>
> The Court is of the opinion that the Copyright Law as interpreted by the Supreme Court of the United States in DeSylva v. Ballentine, 351 U.S. 570 . . . Preclude the inclusion of any heir other than the ward of this Court as having any right or renewal provided the ward survives to the appropriate time.
>
> . . .
>
> It is, therefore, ORDERED, ADJUDGED AND DECREED by the Court as follows:
>
> . . .
>
> 2. That the child born to one Bobbie W. Jett is not an heir of the late Hiriam (Hank) Williams within the meaning of the Copyright Law.

(Exhibit 22)

Despite the Court Orders, Robert Stewart, who was appointed administrator in 1969, continued to set aside money for Cathy Stone, apparently believing that she would one day make another claim for her interest in the

estate. In a series of letters to Richard Frank, attorney for Williams Jr., Stewart stated that "the last two distributions to Randall . . . were actually an encroachment on the one-half of the Estate which could conceivably be claimed by the child." (Exhibit 23) Several months later, he stated that he did "not believe that he [Judge Emmet] will authorize any further distribution [to Williams Jr.] until the Jett child reaches her twenty-second birthday, which will be January, 1975." (Exhibit 24) In April 1974, Robert Stewart once again wrote to Richard Frank, this time to advise him that Cathy Stone had been to Montgomery to claim her homestead which had been set aside for her in Lillian Stone's estate. (Exhibit 25) This lead to speculation that Cathy Stone's "ancestry may well be reasonably obvious to her, and further trouble may ensue." (Exhibit 26)

The Estate of Hiriam Hank Williams was closed in August 1975.

On October 15, 1984, Cathy Stone heard for the first time the words of the October 15, 1952, argreement [sic] between Williams Sr. and Bobbie Jett and discovered that she was, in fact, the daughter of Hiriam Hank Williams.

APPENDIX I-2

IN THE CIRCUIT COURT FOR THE
FIFTEENTH JUDICIAL CIRCUIT
MONTGOMERY COUNTY, ALABAMA

RANDALL HANK WILLIAMS, and WESLEY H. ROSE and ROY ACUFF, as TRUSTEES in LIQUIDATION for STOCKHOLDERS of FRED ROSE MUSIC, INC., both TENNESSEE CORPORATIONS,	*	
PLAINTIFFS,	*	
vs.	*	CIVIL ACTION
CATHERINE YVONNE STONE,	*	NO. 85-1316-K
DEFENDANT.	*	
CATHERINE YVONNE STONE,	*	
COUNTER-CLAIMANT,	*	
vs.	*	
RANDALL HANK WILLIAMS,	*	
COUNTER-DEFENDANT.	*	
CATHERINE YVONNE STONE,	*	
THIRD PARTY PLAINTIFF,	*	
vs.	*	
GULF AMERICAN FIRE & CASUALTY COMPANY; AMERICAN STATES INSURANCE COMPANY; JONES, MURRAY & STEWART, P.C.; IRENE SMITH; THE ESTATE OF ROBERT B. STEWART; et al.	*	
THIRD PARTY DEFENDANTS.	*	

FINAL ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This Cause comes before this Court upon an Action for Declaratory Judgment filed by Randall Hank Williams (hereinafter referred to as Williams, Jr.), Wesley H. Rose and Roy Acuff, as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc. against Catherine Yvonne Stone (hereinafter referred to as Stone), as Defendant.

The Complaint as amended seeks to have the Court declare that Stone has no entitlement to any proceeds or royalties from the Estate of Hiriam "Hank" Williams (hereinafter referred to as Williams, Sr.), that, as an adopted child she is barred from attempting to establish that she is a child of Willliams, [sic] Sr. and that Williams, Jr. is the sole child of Williams Sr. and that Stone has never been adjudicated, under the laws of the State of Alabama, to be the Child of Williams, Sr. The Complaint further seeks to have the Court determine that Stone is barred from now attempting to establish that she is a child of Williams, Sr. by the applicable statute of limitations, the doctrine of laches, waiver and estoppel, and, because of this Court's previous judgments and orders. Finally, Plaintiffs pray that this Court will declare that Williams, Jr. is the sole child and sole heir of Williams, Sr., and thus is the sole person with rights in and to the Estate of Williams, Sr., including, but not limited to, rights in musical compositions, recordings, copyrights, use of the name and likeness of Williams, Sr., and all other tangible and intangible rights deriving from Williams, Sr.'s estate.

Simultaneously with the answer filed by Stone, a counterclaim was filed against Williams Jr. on October 14, 1986. In said counterclaim, Stone alleges that she is the natural daughter of Williams, Sr. and as such is entitled to one-half of the proceeds of his estate. She prays for the entry of judgment that establishes her paternity, and awards her her proportionate interest in the proceeds of the Williams, Sr. estate. She requests that a constructive or resulting trust on all monies derived by Williams, Jr. from the estate of Williams, Sr. be imposed.

Subsequent to her counterclaim, Stone filed on October 24, 1986, a third party complaint against Gulf American Fire and Casualty Company (hereinafter referred to as Gulf American), American States Insurance Company (hereinafter referred to as American States), Jones, Murray & Stewart, P.C., Irene Smith, and the Estate of Robert B. Stewart. The third party complaint alleges that there was an intentional, willful and fraudulent concealment from the Court from 1953 through 1967 of Stone's identity and claim as a natural child of Williams, Sr. It further states that there was a conspiracy to defraud the Court and Stone by purposefully concealing pertinent information and theories that would presumably have entitled Stone to a share in the proceeds of the Williams, Sr. estate. Stone files a claim for relief against the sureties for payment on the surety bond issued by Gulf American and its successor American States on the administrator's bond issued in connection with the estate of Williams, Sr. Pursuant to the third party complaint, Stone requests that the estate be reopened and all previous orders of the Court affecting her status be declared null and void, that she be

allowed to share in a proportionate interest in the Williams, Sr. estate and that she recover general and punitive damages against all third party defendants.

At the present time, four motions for summary judgment are presently pending before the Court on behalf of the following:

1. Williams, Jr., Wesley Rose and Roy Acuff,
2. Irene Smith,
3. Jones, Murray & Stewart, P.C. and
4. Gulf American and American States.

By Order of the Court, pursuant to an agreement of the parties, the Estate of Robert B. Stewart was dismissed on April 3, 1987.

The Court has reviewed the various motions submitted along with the arguments and briefs of learned counsel and is now of the opinion that the Court has jurisdiction over the parties and of the causes of action. Pursuant thereto, the Court does hereby proceed to enter this its final order on all motions for summary judgment.

For the purposes of this order, the Court makes the following findings of fact which, in its opinion, are not in dispute.

On October 15, 1952, Williams, Sr. and Bobbie W. Jett entered into a written agreement relative to the custody and support of an unborn child that was being carried by Jett. The agreement was prepared by and executed in the presence of Robert B. Stewart, an attorney in the general practice of law in Montgomery County, Alabama.

The agreement stated that Bobbie W. Jett was pregnant and that Williams, Sr. may have been the father of said child. It was obviously the desire of the parties to agree to the support and custody of the child through the provisions of the agreement that they entered into. The agreement called for Williams, Sr. to provide room and board for Jett up until delivery, to provide periodic support for Jett pending the birth and to pay for all necessary expenses incurred for the actual delivery.

Jett was to be provided with a one way ticket to California by Williams, Sr. within 30 days after the birth of Jett's child and physical custody of the child would vest in Williams, Sr.'s mother, Mrs. Lillian Williams Stone. Specifically the agreement provided:

> After the birth of said child, both parties agree that it shall be placed with Mrs. W.W. Stone of Montgomery, and that she shall have full custody and control of said child for a period of two years after its birth and that during said time the said Hank Williams will provide and pay for a nurse and will pay all necessary expenses for clothing, food, medical care, and other attention which is required by the child during said two year period. . . . Beginning at the third birthday of said child, its custody and control shall vest in the said Hank Williams and the child shall live with him continuously and be wholly and completely supported by him, and cared for by him until it reaches its fifth birthday at which time the custody of the child shall be divided between both parties; . . . The responsibility for the support of said child shall be in Hank Williams both during the times when he has custody of the child and when it is visiting its mother.

> In view of the fact that the paternity of said child is in doubt and is not to be in any way construed as admitted by this agreement which is made solely because of the possibility of paternity, the said Bobbie W. Jett does hereby release the said Hank Williams from any and all further claims arising out of her condition or the birth of said child.

William, Sr. died intestate on January 1, 1953.

Lillian Williams Stone filed for letters of administration for the Williams estate in the Probate Court of Montgomery County, Alabama in January 1953. In her petition, she listed the heirs and distributees of the intestate estate as:

> Billie Jean Jones, "who states she is the widow",
> Randall Hank Williams, Jr.,
> Mrs. Irene Williams Smith, a sister
> Elonzo H. Williams, father and
> Lillian S. Stone, mother.

The Petition was prepared by Robert B. Stewart, the same attorney who had prepared the Williams, Sr./Jett agreement several months earlier.

Five days after the death of Williams, Sr., Jett gave birth to Stone who was given the name of Antha Bell Jett. By agreement, the baby was left with Mrs. Lillian Stone and Jett left the state.

On or about January 28, 1953, Lillian Stone contacted the Montgomery County Department of Pensions and Security about the possibilities of adopting the baby. In explaining how she came to have physical custody of the baby it is probable to assume as correct that she reported to them that Jett was the mother of the child and that her son, Williams, Sr. was the father.

The record of these proceedings seems to indicate that Lillian Stone, on several occasions told others that the baby had been fathered by her son.

In July of 1953 a petition for adoption was filed by Lillian Stone and her husband for the adoption of Antha Bell Jett (Stone) in the Probate Court of Montgomery County, Alabama. An interlocutory order of adoption granting temporary custody of Stone to William W. Stone and Lillian Stone was issued on September 21, 1953. The Montgomery County Department of Pensions and Security began supervision on that date and continued the same until a final decree of adoption was entered on December 23, 1954. At that time an adoptive parent/child relationship between William Wallace Stone and Lillian Williams Stone and Antha Bell Jett (Stone) was established. The child's name was changed to Catherine Yvonne Stone.

Lillian Williams Stone died on February 26, 1955. Stone's adoptive father was unwilling to continue the parent child relationship that had been established through the original adoption decree and Stone was made a ward of the State of Alabama by decree of the Juvenile Court of Montgomery County, Alabama on April 22, 1955. She was placed in the home of Mrs. Ilda Mae Cook as a foster child.

In February of 1956, Stone was transferred by the Montgomery County Department of Pensions and Security to Mobile, Alabama to the home of George Wayne and Mary Louise Deupree. Although it was initially another foster home placement, the Deupree's ultimately instituted adoption proceedings and on April 23, 1959 Stone was again adopted. Thus, a second adoptive/parent child

relationship was established for Stone, this time with Mr. and Mrs. Deupree. Stone's name was then changed to Cathy Louise Deupree.

The record contains correspondence between the attorney for the estate, Robert B. Stewart, and one Harold Orenstein, legal counsel for Wesley Rose. The correspondence was transmitted in 1962 and it contains discussions concerning the status of Stone. The Orenstein letter in pertinent part reads:

> D. *CATHERINE YVONNE STONE* – From the documents which you have furnished to me, Catherine Yvonne Stone . . . was returned to the State of Alabama Welfare Department after the death of Lillian Stone, and then re-adopted by persons unknown. Nowhere in the documents is there an indication of the names of the natural parents of Catherine Yvonne Stone. We assume that these documents were the ones that you mentioned had been sealed and could never be re-opened. . . . It would appear that some token payment to the State of Alabama Welfare Department . . . on behalf of this child may or may not be indicated. There is no way of evaluating now what a share of the renewal copyrights would be worth and no one could predict their valuation. We feel that a nominal payment might forever cut off the right of this child to the renewals.

In response, Stewart wrote in pertinent part:

> None of this would seem to affect the child's statutory right to copyright renewal. (Referring to the right of Stone to receive a homestead share in the Lillian Stone estate). The adoption might affect any right to which the child was entitled through the father. . . . (W)e may be

faced with a difficult problem, and certainly one we would not want to litigate.

As possible alternatives we can:

a. consider that by the adoption all rights under the renewal statute have been lost.

b. Try to explain the matter to our Welfare Department which does not want the child to know its background, but which would probably feel a duty to protect any right the child might have, and hope for a cooperative settlement and court approval.

c. Petition the court for approval of an agreement between Acuff-Rose and the Guardian, requesting that a guardian ad litem be appointed for Randall and another for all other possible minors who might claim a similar renewal right. If we use this procedure, the guardian ad litem will have to know what we are talking about, and might be vigorous in asserting this right. Much would depend on the person appointed, over which we have no control.

I do not believe we can make a token payment to the Welfare Department since any payment which would bar a later claim would have to be made with the understanding of the facts by the court.

It was not until 1967 that any Court having jurisdiction over the estate of Williams, Sr. was advised of the possibility that Williams, Sr. may have died leaving a child other than Williams, Jr. That fact surfaced in two actions then pending before the Circuit Court for Montgomery County, Alabama.

In that year, Audrey Williams, the mother of Williams, Jr. filed a petition for final settlement in the Williams, Sr. estate and a petition to vacate and for accounting and transfer in the guardianship estate of Williams, Jr. then a minor. At that time, Irene Smith was the administratrix of the Williams, Sr. estate and the Alabama guardian of Williams, Jr. in the guardianship estate. In the capacity as aforementioned, Smith filed her response to the petitions filed by Audrey Williams. It was in those answers that the question of existence of the legal rights of Stone and any other unknown heirs were first raised. In each proceeding the Court appointed Drayton N. Hamilton, Esq. to be the guardian ad litem to represent the interest of any minor person(s) who might have an interest in the matters involved in the proceedings.

The record reflects that Hamilton had previously served as guardian ad litem for Stone in proceedings relating to the estate of Williams Sr.'s mother, Lillian Stone, in 1963. It appears, however, that at that time Hamilton knew only that she was an adopted child of Lillian Stone. According to Hamilton, the first time that he became aware that Stone may possibly have been fathered by Williams, Sr. was after he had been appointed guardian ad litem in the proceedings initiated by Audrey Williams.

In 1967 and 1968 Stone lived in Mobile with her adoptive parents Mr. and Mrs. Deupree. The Deuprees knew of the pendency of the proceedings in Montgomery and had conversations with Hamilton concerning those proceedings. The record seems to establish that Stone's adoptive parents were not interested in pursuing the

matter on behalf of their daughter. Hamilton continued his representation and actively participated in all phases of the proceedings.

A trial was conducted on the merits before Honorable Richard P. Emmet of the Circuit Court of Montgomery County, Alabama. At trial Hamilton argued that Stone was the legitimate daughter of Williams, Sr. through the operation of law as applied to the October, 1952 agreement between Williams, Sr. and Jett. He posited that the agreement met the statutory requirements for legitimation in the State of Alabama. In the alternative, he challenged existing state law on constitutional grounds. In summary he argued:

> We conclude that the Court must determine that the child . . . is the natural child of Hank Williams; secondly, that the said child is the legitimate daughter of Hank Williams under Alabama law and the facts of the case; thirdly, that even if the child has not been legitimated she should share in the estate as the natural daughter of Hank Williams and lastly, that there can be but little question that this child has a present right under the Copyright Laws of the United States to share in the income from the Hank Williams compositions. . . .

The Court issued its first Order on December 1, 1967. It was in the Williams, Sr. Estate case. In the Order the court found as follows:

> The principle issue raised by the Petition . . . and by the Answer . . . is the right of Randall Williams to inherit from his father's estate as the sole beneficiary. The pleadings, the testimony, and the exhibits raise the question of the right of another child to receive a part of the assets of this estate as a natural child which has been

> legitimated (sic) under Alabama's statutory procedure. The Guardian Ad Litem has also sought a determination by the Court that this child, even if not legitimated as required by statute, is a natural child of Hiriam Hank Williams and as such has certain right under the Federal Copyright Statutes. *The Court does not believe it is necessary to make this latter determination* (emphasis added).
>
> In the opinion of the Court, there has not been sufficient compliance with the requirements of Section 11 of Title 27 of the Code of Alabama to give the child in question any right of inheritance from Hiriam Hank Williams or to receive any part of his estate. The Court is further of the opinion that under all the evidence heard and considered by the Court, Randall Williams is the sole heir and only distributee of the Estate of Hiriam Hank Williams. . . .
>
> IT IS THEREFORE, CONSIDERED, ORDERED AND DECREED by the Court:
>
> . . . .2. That Randall Williams is the sole heir of his father, Hiriam Hank Williams, and is the only beneficiary of his estate now administered by this Court.

The Order of the Circuit Court in the guardianship estate case was issued on January 30, 1968. In that order, the Court went further and made additional findings and drew additional conclusions of law relative to the status of Stone. The Court found:

> Addressing itself to the question of the child born to one Bobbie W. Jett, the Court finds from the evidence the child does not have any right in the copyrights or the renewal of those rights of the late Hiriam (Hank) Williams.

> The Court is impressed with the argument of the Guardian Ad Litem. The Court adopts the sound reasoning advanced in brief that the time is long past due when illegitimate off-spring should be afforded adequate property rights. The Common law is severe in calling such off-spring a "non-person" or a "person of no blood".
>
> However, the evidence in this case is without dispute, this off spring of one Bobbie W. Jett is not now a "person of no blood".
>
> The evidence shows the child has been . . . adopted. . . . By fiction of law only but with the same effect as if natural, the child has been infused with the blood of the adopting parents. The evidence shows the final decree of adoption occurred almost ten years ago. The evidence shows the adopting parents were fully informed by the state authorities of these proceedings. The evidence shows the adopting parents chose not to pursue any action in regard to these proceedings.
>
> . . . It is, therefore, ORDERED, ADJUDGED and DECREED by the Court as follows:
>
> . . . 2. That the child born to one Bobbie W. Jett is not an heir of the late Hiriam (Hank) Williams within the meaning of the Copyright Law.

Neither the December 1, 1967 Order in the Estate proceeding nor the January 30, 1968 Order in the Guardianship Proceedings was appealed, although the Guardian Ad Litem sought permission from the trial court to make such an appeal. Those Orders therefore became final pursuant to applicable Alabama law.

Following the death of Williams, Sr., Fred Rose Music, Inc. and Milene Music, Inc., and their predecessors in

interest paid to the estate of Williams, Sr. royalties arising from the usage of the songs composed by Williams, Sr. Following the 1967 and 1968 Orders of the Circuit Court for Montgomery County, and in reliance thereon, royalties were paid to Williams, Jr. as the sole heir of Williams, Sr.

It is interesting to note that even in the light of the Circuit Court Orders, Robert Stewart, who was appointed as the Administrator in 1969, presumably out of an abundance of caution, continued to set aside money for Stone. In a series of letters to the attorney for Williams, Jr., Stewart stated that "the last two distributions to Randall- . . . were actually an encroachment on the one-half of the Estate which could conceivably be claimed by the child." In April of 1974, Stewart advised counsel for Williams, Jr. that Stone had claimed her homestead which had been set aside for her in the Lillian Stone estate. Stewart wrote that Stone's "ancestry may well be reasonably obvious to her, and further trouble may ensue."

The Estate of Williams, Sr. would be closed in August of 1975 without further incident relative to the issue of Stone's rights, if any, to a share in said estate.

In January of 1974, Cathy Stone reached the age of majority. While attending the University of Alabama, she was informed by her adoptive mother that Williams, Sr. might be her father. Stone was also advised that the Circuit Court of Montgomery County was holding certain funds for her from the estate of Lillian Stone. Stone traveled to Montgomery and received the proceeds from the estate of her former adoptive mother. It appears from

the record that it was at about this time that Stone began to seriously seek information concerning her parentage.

From 1976 to 1979 Stone had several encounters with individuals that had knowledge surrounding her earlier years. It appears form [sic] the record that Stone had formed an opinion as to her parentage as early as the Fall of 1979. Stone continued to retrieve documents that bore on the issue throughout the period of 1979 through 1980.

On July 1, 1985 Stone filed an action in the Circuit Court of Montgomery County requesting that certain documents that had been placed under seal be released to her. On August 5, 1985 Stone wrote a demand letter to Williams Jr. and Acuff-Rose/Opryland advising them of Stone's claimed interest in Williams' copyrights. On September 12, 1985, Stone filed an action in the United States District Court for the Southern District of New York, Civil Action No. 85. Civ. 7133 JFK, relative to her alleged rights in the copyrights of musical compositions written in whole or in part by Williams, Sr.

The instant suit was commenced by the Plaintiffs on September 10, 1985 by Complaint for Declaratory Judgment and Injunctive Relief. The Complaint was amended twice with the last amendment being filed on November 14, 1985. Stone filed her Counter claim for Establishment of Paternity, Declaration of Rights and Imposition of Constructive or Resulting Trust on October 14, 1986. Her third party complaint was also filed on that date.

The issues raised by the motions for summary judgment presently before the Court are as follows:

Whether, because of her illegitimate status and her status as an adopted child, Stone is barred by applicable state law from now attempting to establish that she is an heir of the Williams, Sr. estate.

Whether, consistent with prior orders and judgments of this Court, Williams, Jr. is the sole heir of the Williams, Sr. estate and as such has exclusive rights to all proceeds generated in the past by the estate and in the future from copyrighted materials.

Whether Stone has ever been adjudicated to be a child of Williams, Sr.

Whether, based upon the facts not now in Dispute, the third party complaint states a cause of action upon which relief may be granted.

It is obvious from the record that if Stone is in fact the child of Williams, Sr. she is an illegitimate child who was subsequently twice adopted. It is also obvious from the record that Williams, Sr. died intestate. The issue that naturally arises is what rights an after-adopted illegitimate child has to assert a claim against her reputed biological father's estate.

The answer to that question within the context of this case appears to be none. The issue that inevitably follows that determination is what remedies are available to an illegitimate under Alabama law to establish paternity so as to have a bona fide claim to the proceeds of the intestate father's estate.

Presently, there are four ways in the State of Alabama to legitimate a child so that the child can inherit from an intestate father. Two of the methods require either the

marriage of the father and mother and recognition by the father of the child as his own or the filing of a formal written declaration attested by two witnesses. The third method relates to the procedure under the Alabama Uniform Parentage Act (hereinafter referred to as AUPA) which is codified in Section 26-12-1, *et. seq.*, Code of Alabama 1975 as amended. Finally, the fourth alternative is found in the Alabama Probate Code at Section 43-8-48 Code of Alabama 1975 as amended.

The Court is of the opinion that as to the Plaintiffs' claim and as to Stone's counterclaim, the above cited procedures that are presently available are the ones that shall be determinative of the issues that relate to them.

It is undisputed that neither of the first two procedures is applicable in this case. Williams, Sr. died prior to Stone's birth, he never married Stone's mother, and no formal declaration of paternity that met statutory requirements was ever filed.

The fact that Stone was twice adopted after birth acts as a bar to recovery under the AUPA, specifically Section 26-17-6-(e), supra. That section clearly provides that an adopted child may not bring an action to establish paternity under the Act.

In addition, the fact that Stone was twice adopted forecloses recovery under the Alabama Probate Code, Section 43-8-48, supra. That section clearly provides that an adopted person is the child of an adopting parent and not of the natural parents. Stone argues that the fact that she was unadopted at the time of Williams, Sr.'s death would remove her from the applicability of Section 43-8-48. The Court disagrees. At the time of Williams,

Sr.'s death there did not exist a legal relationship between Stone and Williams, Sr. that would entitle her to inherit. If that were the case, Section 43-8-48 would not even be applicable since that section becomes important only if one is attempting to establish that such a relationship does in fact exist.

Assuming arguendo that the Court determined that it should apply the law as it existed at the time of Stone's birth to the issues in this case, the Court is of the opinion that Stone would still be barred from recovery in her counterclaim. To prevail, Stone must establish the existence of a relationship between herself and Williams, Sr. that would allow her to have a valid claim against his estate. Because of the factual circumstances that exist, that becomes an impossibility irrespective of whether the Court applies existing law or the law of 1952.

The 1967 preceedings in the Circuit Court of Montgomery County involved the question of whether or not Stone was an heir of Williams, Sr. At that time, an illegitimate child could not inherit from its natural father unless the child had been legitimated. As Stone had not been lgitimated [sic], the Court held that Stone was not an heir and as a result not entitled to share in the estate. Although the law today differs from relevant applicable standards in 1967, the doctrines of res judicata and collateral estoppel nonetheless now preclude Stone's claim to a share in the William's, Sr. estate. Since the issue and claim by Stone that she is an heir and entitled to inherit was decided in the 1967 proceeding in which the parties were the same, she is thus barred from relitigating that identical issue and claim in this case.

Turning to the issue of the alleged status of Stone as the child (as opposed to legal heir) of William's Sr., it is clear from the record that there was never a judicial determination relative to the biological relationship between Stone and William's, Sr. As the Court noted in 1967, it was not necessary for the Court to make such a determination in reaching its decision at that time as it was irrelevant. Thus, res judicata and collateral estoppel do not affect that question and it remains an issue of disputed fact between the parties.

As to the third party claim filed by Stone, the Court is of the opinion that the main if not the entire thrust of the complaint revolves around an argued duty to disclose and the willful and or fraudulent failure to do so. In 1953 Stone was not an heir to the estate of Williams, Sr., and she could not have been established as such under then existing law. If the existence of Stone had been made known to the Court by any of the third party defendants, it is assumed that the Court in adjudicating her claim would have applied the law as it then existed and would therefore have ruled that her claim was at that time invalid. The only obligation or duty that could be foreseeable in a situation such as exists in this case would be a requirement that the Third Party Defendants act in good faith according to the law of the State of Alabama as it existed at that time. The Court deems it unreasonable to impose upon them the duty to anticipate or foresee what the law should or might become in the future. At the time that the alleged fraudulent concealments puportedly [sic] occurred, full disclosure to the Court or to interested third parties would have been superfluous. Therefore, the Court is of the opinion that the Third Party Complaint

does not state a cause of action for which recovery can be had.

It appears from the record and from a complete review of the proceedings in this case that the law requires that the Court enter a Partial Summary Judgment in this cause. The Court finds that there remains a justiciable issue raised in the Complaint filed by the Plaintiffs where the Court is specifically asked to declare that Williams, Jr. is the sole child of Williams, Sr. This issue as framed by the Complaint is still factually disputed and on that issue Summary Judgment is not appropriate even though it is conceded by the Court that such a determination would not affect the outcome of the other issues raised by the pleadings.

Based on the foregoing it is therefore ORDERED, ADJUDGED, AND DECREED BY THE COURT AS FOLLOWS:

The Motion for Summary Judgment filed herein by the Plaintiffs as it refers to the original Complaint is GRANTED as to all issues with the exception of whether or not the Defendant is the biological child of Williams, Sr.

The Motion for Summary Judgment filed herein by the Plaintiffs as it refers to the Counterclaim is GRANTED as to all issues.

The Motions for Summary Judgment filed by the Plaintiffs and the Third Party Defendants as they relate to the Third Party Complaint are GRANTED on all issues.

Further proceedings in this cause are hereby set on the 25th day of August, 1987 at 10:00 A.M.

DONE THIS THE 14th DAY OF JULY, 1987.

/s/ H. MARK KENNEDY
H. MARK KENNEDY
CIRCUIT JUDGE

Sterling Culpepper
David Johnson
Robert Black
James Hampton
Christian Horsnell
Richard Frank, Jr.
James E. Williams
F. Keith Adkinson
James A. Goodman/Vincent H. Chieffo
Alan Shulman
Stephen K. Rush
Thomas Levy

APPENDIX I-3

IN THE CIRCUIT COURT FOR THE
FIFTEENTH JUDICIAL CIRCUIT
MONTGOMERY COUNTY, ALABAMA

RANDALL HANK WILLIAMS, and WESLEY H. ROSE and ROY ACUFF, as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc., and Milene Music, Inc., both Tennessee Corporations,	)	CASE NO. CV-85-1316-K
PLAINTIFFS,	)	
vs.	)	
CATHERINE YVONNE STONE,	)	
DEFENDANT.	)	

FINAL ORDER

This Cause now comes before this Court for Final Disposition pursuant to previous Orders and proceedings in this matter. Before the Court at this time are all forms of evidentiary matters, the pleadings as filed and post-trial briefs that have been submitted by learned counsel.

The Court on the date of the last hearing took under advisement certain offerings of evidence. The Court will now rule on the admissibility of those items and on any and all outstanding posttrial motions before proceeding to the merits of the remaining issue.

The following exhibits have been offered into evidence, objected to, and are pending admission by the Court:

Defendant's Exhibits 1, 5, 13, 14, 16, 17, 33, 35 & 41.

Upon review of the exhibits as outlined above, the Court does hereby sustain the objections to proffered exhibits nos. 1, 5, 13, 14, 16 and 17.

Upon review of the exhibits as outlined above, the Court does hereby overrule the objections to proffered exhibits nos. 33, 35 and 41 and the same are hereby admitted into evidence.

On October 7, 1987 Defendant filed a Motion to Strike the Posttrial Brief of Plaintiff. That Motion is Denied.

Plaintiffs throughout these proceedings, subsequent to this Court's Order on Motions for Summary Judgment, have objected to this Court's proceeding forward and have excepted to the Court's interpretation of the state of the pleadings. Regardless of whether the question is framed as, is the Defendant the natural daughter of Williams, Sr., or is Williams, Jr. the only natural child, the Court reiterates that the issue that remains before the Court is the biological status of Defendant Stone. The Court is of the opinion that that issue was raised by the Plaintiffs in the original Complaint, was joined by the Defendant, and now is a legitimate, justiciable issue.

In lieu of making additional findings of fact, the Court adopts the findings as stated in the previous Orders of this Court. Based upon those findings and the additional evidence as submitted at the hearing of September 2, 1987, the Court is of the Opinion that it continues to have jurisdiction over the parties and of the subject matter and does hereby enter the following Final Order.

The Court upon consideration of the evidence does hereby find that Hank Williams, Jr. is not in fact the only natural child of Hank Willimas [sic], Sr. in that Defendant Catherine Yvonne Stone is also a natural child of Hank Williams, Sr.

DONE THIS THE 26TH DAY OF OCTOBER, 1987

/s/ H. Mark Kennedy
H. MARK KENNEDY
CIRCUIT JUDGE

Honorable Sterling Culpepper
Honorable David Johnson

APPENDIX J-1

IN THE MATTER OF THE ESTATE OF HIRIAM "HANK" WILLIAMS,	) IN THE CIRCUIT COURT) OF MONTGOMERY) COUNTY, ALABAMA, IN) EQUITY. Case) No. 25056

ORDER

This matter now coming on for hearing is submitted on the amended petition filed by Audrey M. Williams and Randall Williams, the Answer of Irene W. Smith, as Administratrix of the Estate of Hiriam Hank Williams, to the Petition as last amended, the Acceptance of his appointment and the Answer of the Guardian ad Litem to the Petition as last amended, the testimony as noted by the Register and stipulations entered into by the parties through their attorneys of record.

Counsel for the Williams Estate has advised the Court that he does not insist upon his motion to require security for costs and said motion should, therefore, be overruled.

The Court has carefully considered the testimony and the evidence presented by the parties in this case and helpful briefs filed by their attorneys.

The principal issue raised by the Petition as last amended and by the Answer of the Administratrix is the right of Randall Williams to inherit from his father's estate as the sole beneficiary. The pleadings, the testimony, and the exhibits raise the question of the right of another child to receive a part of the assets of this estate as a natural child which has been ligitimated under Alabama's statutory procedure. The Guardian ad Litem has

also sought a determination by the Court that this child, even if not legitimated as required by statute, is a natural child of Hiriam Hank Williams, and as such may have certain rights under the Federal Copyright Statutes. The Court does not believe it is necessary to make this latter determination.

In the opinion of the Court, there has not been sufficient compliance with the requirements of Section 11 of Title 27 of the Code of Alabama to give the child in question any right of inheritance from Hiriam Hank Williams or to receive any part of his estate. The Court is further of the opinion that under all the evidence heard and considered by the Court, Randall Williams is the sole heir and only distributee of the Estate of Hiriam Hank Williams.

The Petitioners and the Administratrix recognize in their pleadings that this estate should remain open because there are or may be unliquidated accounts due the estate, and pending amendments to the Federal Copyright laws make further administration advisable. This Court is, therefore, of the opinion that the Administration of this estate should continue, as it has in the past, under the supervision of this Court.

All issues presented by the pleadings in this case and not specifically decided should, therefore, be reserved.

The Court has considered the time spent and the expenses incurred by the Guardian ad Litem and is of the opinion that he is entitled to a reasonable fee and to be reimbursed for his actual expenses, and that said fee and expenses should be paid by the Estate.

IT IS, THEREFORE, CONSIDERED, ORDERED AND DECREED by the Court:

1. That the motion of Irene W. Smith as Administratrix to require the Petitioner to furnish security for costs is hereby overruled.

2. That Randall Williams is the sole heir of his father, Hiriam Hank Williams, and is the only beneficiary of his estate now administered by this Court.

3. That the fee of the Guardian ad Litem, Drayton N. Hamilton, is fixed at Two Thousand Dollars ($2,000.00), which includes his expenses through the date of trial.

4. All other matters are reserved.

5. The costs of these proceedings, including the fee and expenses of the Guardian ad Litem, are taxed against the Estate of Hiriam Hank Williams, for which execution may issue.

Done this 1 day of Dec, 1967.

/s/ Richard P. Emmet
Circuit Judge

APPENDIX K-1

IN THE MATTER OF THE GUARDIANSHIP OF THE ESTATE OF RANDALL HANK WILLIAMS, a minor.	:	IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA IN EQUITY CASE NO. 27,960

This cause comes on to be heard upon the pleadings, all as noted by the Register.

This Court finds it has jurisdiction of the cause and of the parties.

As to the question of jurisdiction of the cause, the Court rejects the contentions of Respondent Smith and Respondent Rose as to the application of any Statute of Limitation.

This Court has now exercised continuing jurisdiction of this guardianship for some fifteen years. In this or any other guardianship there occurs nothing during the course of the guardianship to which any Statute of Limitation applies insofar as any conduct between the guardian and ward. The inherent rules of equity jurisdiction would allow a subsequent review of any conduct by the guardian. The relationship existing between a guardian and a ward is never a relationship of opposing advocates. As such, the approval by the Court, exercising continuing jurisdiction of the guardianship, of the conduct of a guardian in any situation is subject to subsequent review by that Court upon additional evidence being presented. It matters not in what mode of pleading such evidence is

presented. Indeed, a Court, *ex mero motu*, should act upon such evidence. The only rule prescribed by law of the state is to protect the interest of the ward. Likewise, any third party desirous of contracting with the ward is subject to the same continuing jurisdiction.

The Court rejects further the contention that only upon actual and extrinsic fraud can the previous decree of *this* Court be vacated. The cases relied upon in this contention concern the vacating of decrees by one Court of other Courts' decrees. None of the cases cited concern an interest of a Court's Ward.

This Court, exercising continuing jurisdiction of the guardianship and being governed only by the rule of law which requires the best interest of the ward to be paramount, is allowed to weigh any legal evidence properly presented at any time now or subsequent as to any contractual relationship previously approved by this Court. There exists no limitation to this inherent right of equity in protecting a ward.

It follows that this Court has jurisdiction of this cause and has the duty at this time of looking further into the matter of this Court's Decree in this same cause dated March 19, 1963.

A finding of fact in this guardianship is incomplete without an incorporation of the facts elicited from the evidence in scores of other hearings in this case and in the Estate of Hiriam (Hank) Williams, Case No. 25,056, Fifteenth Judicial Circuit of Alabama.

This Court has carefully reviewed the evidence in its entirety. The review has not been in the light of any

narrow restrictions suggested by the contentions of jurisdictional or statutory limitations or burdens of proof as to actual and extrinsic fraud. This Court has weighed the evidence only in the light of the best interest of this ward. In this light, and with the benefit of hindsight in now looking back through the years to the year 1963, it is inescapable that the contract in question was then and is now in the best interest of the ward. The Court finds that the relationship created by the contract is provident for the ward.

The Court finds there are aspects of the relationship created by this contract which are not subject to the utmost clarity. These aspects concern the unpublished artistic work of the deceased father of the ward; the benefits of affiliation with the performing societies; and future royalty schedules being more completely detailed. The Court finds the best interest of the ward requires that these matters be spelled out in detail. The Court is aware that these questions might possibly be matters within the framework of the Estate, however, they have a direct bearing on the guardianship.

Addressing itself to the question of the child born to one Bobbie W. Jett, the Court finds from the evidence the child does not have any right in the copyrights or the renewal of those rights of the late Hiriam (Hank) Williams.

The Court is impressed with the argument of the Guardian ad Litem. The Court adopts the sound reasoning advanced in brief that the time is long past due when

illegitimate off-spring should be afforded adequate property rights. The common law is severe in calling such off-spring a "non-person" or a "person of no blood".

However, the evidence in this case is without dispute, this off-spring of one Bobbie W. Jett is not now a "person of no blood".

The evidence shows the child has been permanently adopted under the very excellent, wise, and beneficial direction of this State's Department of Pensions and Security. By fiction of law only but with the same effect as if natural, the child has been infused with the blood of the adopting parents. The evidence shows the final decree of adoption occurred almost ten years ago. The evidence shows the adopting parents were fully informed by the state authorities of these proceedings. The evidence shows the adopting parents chose not to pursue any action in regard to these proceedings.

The Court is of opinion that the Copyright Law as interpreted by the Supreme Court of the United States in *DeSylva v. Ballentine*, 351 U.S. 570; 100 L.Ed. 1415; 76 Sp. Ct. 974, preclude the inclusion of any heir other than the ward of this Court as having any right of renewal, provided the ward survives to the appropriate time.

Notwithstanding the proposed revision of the Copyright Law of this nation pending in the Congress, this Court retains the same opinion.

The pen of this Court cannot rest without one final finding. The attorney for this guardian and for the estate traces his professional connection from the time when the name Hank Williams was but another "drifter" passing

before the Bench of a local small claims and misdemeanor Court. But for the professional care, tenacity, diligence, interest and concern of this gentleman, the estate of this ward would not be as considerable as it is, nor would its future prospects be so bright. His conduct is in the highest tradition of a very noble profession.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court as follows:

1. That the contract in question is in the best interest of the ward and that the decree of this Court dated March 19, 1963 should not be vacated.

2. That the child born to one Bobbie W. Jett is not an heir of the late Hiriam (Hank) Williams within the meaning of the Copyright Law.

3. That certain provisions of the contract do not contain sufficient clarity. That these provisions are subject to additional attention by the parties hereto. That in the failure of the parties hereto to reach accord, the Court upon application will proceed to adjudge these matters. That the Court retains jurisdiction of this cause to effect this provision.

It is regrettable cordiality does not exist in this situation. It would seem that the large and significant community of interest between the ward and Respondent Rose could build a bridge which would renew and continue one of the very few genuine traditions found in the entire entertainment industry, now noted for its phony traditions. It is hoped by the Court that this area of negotiation will lead to this.

4. That the fee of the Guardian ad Litem be $5,698.72 which sum shall include all expenses including travel and that the same be taxed as part of the cost.

5. That the cost of these proceedings be taxed one-third against the guardianship and two-thirds against Respondent Rose. The taxing against the guardianship is based upon the fact that the funds expended belong to the ward and the ward is now the only petitioner.

DONE, this the 30 day of Jan, 1968.

/s/ Richard P. Emmet
Circuit Judge

No. 89-1563

MAY 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., ABERBACH ENTERPRISES, LTD., ACUFF-ROSE-OPRYLAND MUSIC, INC., MILENE-OPRYLAND MUSIC, INC., WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc., FRED ROSE MUSIC, INC., and MILENE MUSIC, INC.,

Petitioners,

vs.

CATHY YVONNE STONE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS HAD THE INHERENT POWER TO RECALL ITS MANDATE, GRANT A SECOND PETITION FOR REHEARING AND RECONSIDER ITS EARLIER CONCLUSION REGARDING PETITIONERS' CLAIMED PREJUDICE IN VIEW OF THE UNDISPUTED EVIDENCE IN THE RECORD ON APPEAL THAT PETITIONERS KNEW ABOUT RESPONDENT AND HER CONTINGENT RENEWAL INTEREST LONG BEFORE RESPONDENT DID.

2. WHETHER THE FILING AND/OR DENIAL OF A PETITION FOR WRIT OF CERTIORARI DIVESTS A COURT OF APPEALS OF ITS INHERENT POWER TO RECALL THE MANDATE AND GRANT A SECOND PETITION FOR REHEARING.

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IV. STATEMENT OF THE CASE[1]

A. Statement Of Facts.

Respondent's natural mother, Bobbie W. Jett ("Jett"), and Hank Williams, Sr. executed a custody and support agreement on October 15, 1952. That agreement describes Williams, Sr. as Respondent's father three times. Respondent was to be cared for by Williams, Sr.'s mother, Mrs. Lillian Stone ("Mrs. Stone"), until she turned three. Williams, Sr. was to have custody of the child for the next three years, after which he and Jett were to have joint custody. The agreement's operative provisions are quoted in App. H at H-1.5-1.7.[2]

---

1 Only those facts pertinent to whether certiorari should issue which are not in Petitioners' Statement of the Case are set forth herein. A more comprehensive statement of facts is contained in Respondent's Petition for Writ of Certiorari in Stone vs. Williams, Jr., et al., No. 89-295.

2 References to "App." are to the Appendices to the Petition for Writ of Certiorari.

Mrs. Stone told the Alabama adoption agency that her son was Respondent's father (App. H at H-1.14-1.15). The contemporaneous adoption records, sealed under state law, state that Williams, Sr. is Respondent's father (Id.). Mrs. Stone (and her husband) adopted and cared for Respondent until Mrs. Stone died in 1955.

When Irene Smith, Williams, Sr.'s sister (and thus Respondent's aunt), reneged on her promise to care for Respondent if Mrs. Stone could not, Respondent was made a ward of the state (App. B at B-1.4). Smith also acknowledged that her brother was Respondent's father (App. H at H-1.17-1.20). Respondent lived in a foster home until she was placed with, and in 1959 adopted by, George and Mary Deupree (App. B at B-1.4).

In 1960 or 1961 Smith was the Alabama guardian of Williams, Jr. In that capacity she was represented by Robert Stewart, Williams, Sr.'s attorney ("Stewart"). Petitioner Fred Rose Music, Inc. ("Fred Rose Music") began negotiating with Stewart to acquire Williams, Jr.'s contingent renewal copyright interest in the Williams, Sr. compositions. Fred Rose Music learned about Respondent and her potential claim to the Williams, Sr. estate and the renewal copyrights from Stewart during these negotiations. They jointly considered how Respondent's rights could be cut off (App. H at H-1.21-1.26). Rather than settle the issue of Respondent's rights, Fred Rose Music embarked upon a course of conduct with Stewart and Smith to conceal those rights from Respondent and the world.

By a March 20, 1963, agreement with Smith (as Williams Jr.'s guardian), Fred Rose Music was assigned his contingent renewal copyright interest. Although all parties to the assignment knew of Respondent and her contingent interest, she is not included in the agreement's list of people warranted to be the only other "children" or "next of kin".[3] Stewart filed an action in the Alabama state court to obtain approval of the assignment. Respondent's existence and relationship to Williams, Sr. was not disclosed.

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3 Aware that the assignment from Williams, Jr. had value only if he was alive when the renewal copyrights came into existence, Miller Music Corp. v. Charles N. Daniels, Inc., 362 U.S. 373, 377-78 (1960), Fred Rose Music also purchased Smith's contingent interest as Williams, Sr.'s next of kin for $5,000, obtained an assignment from Smith's son of his contingent interest for no additional payment, purchased the contingent interest belonging to Williams, Sr.'s half-sister for $2,000, and that of his father for $1,500.

Several years later, the assignment was challenged by Audrey Mae Williams, Williams, Sr.'s first wife and Williams, Jr.'s mother. To defend the fairness of the 1963 assignment, Smith advised the Alabama court for the first time that there might be others possessed of an interest in the renewal copyrights (App. H at H-1.31-1.32). Drayton Hamilton was appointed guardian ad litem for any unknown potential heirs.[4]

Upon learning of the circumstances of Respondent's birth and over the objection of her adoptive parents, Hamilton argued that Respondent was an heir of Williams, Sr. Williams, Jr.

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4 Hamilton had acted as Respondent's guardian ad litem in the probate of Mrs. Stone's will, at which time he knew only that she had been adopted by Mrs. Stone. Smith, the sole beneficiary under that will, successfully defeated Hamilton's attempt to have Respondent, her niece, deemed to be a pretermitted heir of Mrs. Stone's. Hamilton v. Smith, 86 So.2d 283 (Ala. 1956).

objected to the court adjudicating Respondent's interest in the renewal copyrights because they were not part of Williams, Sr.'s estate, but Fred Rose Music insisted that the issue be determined so that a favorable ruling might be raised to bar any claim she might later assert. The state court ruled that Williams, Jr. was the only heir because Respondent had not been legitimated in the manner then required by Alabama law and had been adopted twice after Williams, Sr.'s death.

Stewart replaced Smith as administrator of the Williams, Sr. estate after she was convicted of cocaine smuggling in 1969. Even though the Alabama court had ruled Respondent was not an heir, Stewart began setting aside a portion of the estate income in case the issue was revisited (App. H at H-1.26). He did so

until the estate was closed in 1975.[5]

Respondent was entitled to receive approximately $3,800 from Mrs. Stone's homestead allowance when she turned 21. Respondent claimed that inheritance in 1974. When Stewart learned of this, he advised counsel for Williams, Jr. that "trouble might ensue" (App. H at H-1.26). Rather than confront the situation when percipient witnesses were alive and evidence of Respondent's paternity was readily available, Williams, Jr. and the Acuff/Rose Petitioners did nothing.

Though not parties to the 1967-1968 proceedings, the Berlin/Aberbach Peti-

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5 Respondent submits that Stewart did this for two reasons. First, under Alabama law, Respondent could challenge the 1967-1968 orders until January 1976, two years after she turned 21 (App. H at H-1.35). Second, the then proposed amendments to the 1909 Copyright Act, 17 U.S.C. §1, et seq. (1976 ed.), provided that illegitimates were children for purposes of §24 and, if enacted, would have confirmed Respondent's rights in the renewals.

tioners learned of Respondent and her renewal rights about 10 years before this case was filed and joined in the scheme to keep her ignorant of those rights. Berlin had relinquished her claims to the Williams, Sr. estate in exchange for $30,000 in 1953. In 1969, Berlin assigned whatever contingent interest she might have to Hill & Range Songs, Inc., a predecessor of Petitioner Aberbach. Hill & Range then filed an action seeking a declaration that (through Berlin) it was entitled to a 50% interest in the renewals. Hill & Range Songs, Inc. v. Fred Rose Music, Inc., 403 F.Supp. 420 (M.D. Tenn. 1975), aff'd, 570 F.2d 554 (6th Cir. 1978).

Respondent's existence and the contents of the 1952 custody/support agreement were disclosed as part of Stewart's 1973 deposition in that case.

It was agreed that, because it was not in the best interests of either party to make the agreement part of a public court record, the document would not be made an exhibit or disclosed further.

After trial in 1975, the District Court held that Berlin owned the widow's share of the renewals. Hill & Range Songs, Inc., supra, 403 F.Supp. at 436. As a result of this decision, Williams, Jr. and the Acuff/Rose Petitioners were required to share the renewal copyright revenue with Berlin and the Aberbach Respondents regardless of any agreements they previously had entered into believing that they alone owned those rights. In 1976, Congress enacted the 1976 Copyright Act, 17 U.S.C. §101, et seq., which in §101, specifically includes illegitimates within the definition of children for

purposes of renewal copyrights. Even after these two events, Petitioners took no steps to determine or acquire Respondent's renewal rights and continued to conduct their respective businesses fully aware of those rights.

B. History Of The Case.

Respondent filed this action on September 12, 1985. In March 1987, Petitioners filed a joint motion for summary judgment on the ground that, as a matter of law under De Sylva v. Ballentine, 351 U.S. 570 (1956), Respondent is not Williams, Sr.'s child for purposes of renewal copyrights under either 1909 Act, §24 or 1976 Act, §304(a). In addition, Petitioners argued the action was barred by res judicata, collateral estoppel, the 1976 Act statute of limitations, laches, estoppel and waiver.

The motions were argued on August 6, 1987 and taken under submission. Thirteen months later the District Court granted Petitioners' joint motion on the sole ground that Respondent had been guilty of laches. The District Court held as a matter of law that she had unreasonably delayed pursuing her claim between 1974 and 1981, and on the basis of conclusory affidavits, that Petitioners would be prejudiced if the case was allowed to proceed (App. C at C-1.16-1.18).

Respondent appealed to the Court of Appeals for the Second Circuit. On April 21, 1989 that Court affirmed the District Court ("the Earlier Decision"). The Court of Appeals held that Respondent's failure to file an action between 1974 and 1980 "may well have been entirely excusable" (App. B at B-1.9-

1.10), but that her delay between 1981 and September 1985 was without plausible explanation (Id.). Based upon the conclusory affidavits filed in the District Court, the Court of Appeals also held that Petitioners would be prejudiced because of the death or faded recollection of certain witnesses and because Petitioners had entered into transactions in reliance on Respondent's failure to assert her claim during that time (App. B at B-1.11-1.13). Respondent's petition for rehearing was denied on May 23, 1989.

In its July 5, 1989 decision (see pp. 16-18 infra), the Alabama Supreme Court reviewed the evidence which Respondent had cited to the Second Circuit and concluded that Respondent's claims in that forum were not barred by laches (App. H at H-1.36-1.39). To enable the

Court of Appeals to reconsider its conclusion as to prejudice in view of the Alabama Court's recitation of the facts if it so chose, Respondent moved the Court of Appeals to recall its mandate and grant her leave to file a second petition for rehearing.

Pursuant to former Rule 20.4 of this Court, Respondent's Petition for Writ of Certiorari was due on August 21, 1989 absent an order extending time under former Rule 20.6. Recognizing that such applications "are not favored" and not being able to predict how and when the Court of Appeals would rule on her motion, Respondent timely filed her Petition for Writ of Certiorari and advised this Court of the pending motion in the Court of Appeals (App. F at F-1.22, n. 10).

The Court of Appeals granted Respondent's motions on August 24, 1989 (App.

E at E-5.1). Respondent filed her Petition for Rehearing and Suggestion for Rehearing In Banc on September 7, 1989, (App. E at E-6.1), and Petitioners herein filed three separate opposition briefs (totaling 35 pages, excluding appendices) on September 14, 1989. The matter then stood submitted without oral argument pursuant to Rule 40(a), F.R.App.P.

In this Court, Petitioners' Brief in Opposition to Respondent's Petition for Certiorari was timely filed. Because the Court of Appeals had not yet ruled on her Petition for Rehearing, Respondent moved this Court to defer consideration of her Petition (App. F-2). That motion and the Petition were denied on November 6, 1989 (App. F-3).

C. The Alabama Supreme Court Opinion.

While Respondent was prosecuting this action, litigation over her status

as an heir of Williams, Sr., her rights to the copyrights, and the validity of the 1967 and 1968 orders was proceeding in Alabama as well. Petitioners Williams, Jr., Acuff and Rose filed that lawsuit soon after they received Respondent's August 5, 1985 notice of claim to the renewals. Respondent filed a third party complaint in that litigation against Irene Smith, Stewart's estate (later dismissed), and Stewart's now dissolved law firm, Jones, Murray and Stewart, P.C. Respondent alleged that the Williams, Sr. estate should be re-opened because the 1967 and 1968 orders had been obtained through legal fraud committed by those third party defendants and other, fictitiously-named defendants.[6]

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6 The complaint and counterclaim in that litigation also sought a judicial declaration as to the validity of those orders (App. H at H-1.2-1.3).

The trial court entered summary judgment against Respondent on this issue. On July 5, 1989, the Alabama Supreme Court reversed that ruling. It held that legal fraud had been committed in the 1967 and 1968 proceedings in that (1) Smith, Stewart and others had concealed the circumstances surrounding Respondent's birth and subsequent correspondence regarding her potential rights, (2) had concealed the fact that Williams, Sr., Mrs. Stone and Smith all had acknowledged that Respondent was Williams, Sr.'s daughter, and (3) that Stewart, Smith and others, including Petitioners Williams, Jr. and Rose, had affirmatively prevented Respondent from learning of and asserting her rights to the estate and the renewal copyrights.

The Court set aside the 1967 and 1968 judgments in part, and held that Respondent "is entitled to receive her proportionate share of any proceeds of the estate of her natural father, Hank Williams, including any income or interest, and of any copyright royalties, but prospectively only from the date she gave notice of her claim, August 5, 1985." (App. H at H-1.55).

Petitioner Williams, Jr. filed a Petition for Leave to Appear in the Alabama appeal and requested that the Supreme Court vacate and modify its opinion (App. H at H-2.1). On November 9, 1989, the Court filed its Opinion on Rehearing (App. H-2). That Court "considered very closely" Williams, Jr.'s arguments (App. H-2 at H-2.12), but held that Respondent was not prevented from successfully appealing one

of the rulings which held that the estate should not be reopened by her failure to appeal a second ruling entered the same day embodying the same holding (App. H-2 at H-2.10).

D. The Second Circuit Opinion On Rehearing.

After the November 9, 1989 Opinion on Rehearing was handed down, Respondent sought leave to file a supplemental brief with the Second Circuit to advise that Court of that Opinion and its significance. That motion was granted over Petitioners' opposition. On December 5, 1989, the Court of Appeals filed its Opinion on Petition for Rehearing ("the Instant Decision") (App. A). The Court discussed the evidence reviewed in the Alabama Supreme Court's Opinion, all of which was part of the record on appeal to the Second Circuit. The Court of

Appeals noted that it was not bound by the Alabama decision (App. A at A-1.8). Nevertheless, the Court concluded that a reappraisal of its earlier conclusion on laches was necessary given the opposite conclusion the Alabama Court had reached based on the identical evidence.

With admirable judicial honesty, the Second Circuit concluded that the Earlier Decision had been wrongly decided. It held that, given Petitioners' pre-existing knowledge of Respondent and her potential claims and the legal fraud committed in connection with the 1967-1968 Alabama proceedings, Petitioners "should not now be allowed to claim that they are prejudiced by [Respondent's] present assertion of her rights when they were aware of them all along." (App. A at A-1.9) [emphasis added].

The Second Circuit's change of mind with respect to laches was not based on the Alabama Court's decision to reopen the Williams, Sr. estate, but rather on the facts recited in the opinion which led to that decision. The two cases are not "inextricably related" (Petn. at 1) and this Petition should be considered on its own.

V. SUMMARY OF ARGUMENT

The Court of Appeals accurately described the uniqueness of this case when it stated that the litigation "is a contest, after all, between Hank Williams' heirs over copyright renewal rights." (App. A at A-1.9). The Alabama Supreme Court also noted "the unique character" of the litigation in that forum, (App. H at H-1.54), and took its "peculiar circumstances into consideration" when it fashioned the relief

awarded in that case (Id.).

In their Brief in Opposition to Respondent's Petition for Writ of Certiorari in No. 89-295, Petitioners characterized this case as nothing more than an "academic or episodic" problem not deserving of this Court's consideration, citing Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955). They argued that the Court of Appeals had applied the laches doctrine correctly to a peculiar set of facts which was not likely to repeat itself, and that the case did not present any special and important reasons for granting the requested writ.

This case is no less unique, presents no less an academic or episodic problem, and is no more entitled to review by this Court now that the Court of Appeals has "reassess[ed] the equita-

ble circumstances peculiar to this case", changed its mind, and held "the equities fall on [Respondent's] side." (App. A at A-1.9). The Court of Appeals did not depart from the accepted and usual course of proceedings when it re-evaluated the Earlier Decision. That Court exercised its inherent power to recall its mandate, received and considered extensive briefs on rehearing filed by all parties, and reassessed its prior conclusion regarding Petitioners' claimed prejudice.

That it is rare for a Court of Appeals to recall its mandate and then vacate an earlier decision does not make such action worthy of this Court's review. The exacting standards applicable to motions to recall and petitions for rehearing provide more than sufficient safeguards against successive

and/or untimely rehearings.

Petitioners' supposition that the Court of Appeals applied a new, unarticulated standard of review because the Instant Decision does not repeat that portion of the Earlier Decision is just that - supposition. A supposedly unarticulated standard of review does not supply the clear and unambiguous statement of law which must be compared to decisions of this Court or other courts of appeal to determine whether a direct and specific conflict on an issue of national significance exists.

VI. ARGUMENT

A. The Court of Appeals Possessed The Inherent Power To Recall Its Mandate And Grant The Second Petition For Rehearing.

To state the truism that neither statutes nor the Federal Rules of Appellate Procedure authorizes successive

petitions for rehearing begs the question of whether the Court of Appeals acted properly in this case. It is a well established and uniform rule throughout the country that courts of appeals have the inherent power to recall their mandates. See eg., Zipfel v. Halliburton Co., 861 F.2d 565, 567 (9th Cir. 1988); Coleman v. Turpin, 827 F.2d 667, 671 (10th Cir. 1987); A to Z Portion Meats, Inc. v. N.L.R.B., 643 F.2d 390, 392, n.1 (6th Cir. 1980); Dilley v. Alexander, 627 F.2d 407, 410-11 (D.C. Cir. 1980); American Iron & Steel Institute v. E.P.A., 560 F.2d 589, 592-94 (3rd Cir. 1977), cert. denied, 435 U.S. 914 (1978); Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427, 429 (2d Cir.), cert. denied sub. nom, Addabbo v. Curtiss-Wright Corp., 400 U.S. 829 (1970), Gradksy v. United

States, 376 F.2d 993, 995 (5th Cir.), cert. denied sub. nom, Grene v. United States, 389 U.S. 908, reh'g. denied, 389 U.S. 998 (1967).

It is equally well-established and uniformly the rule that courts of appeal exercise this power only in exceptional circumstances. See e.g., Johnson v. Bechtel Associates Professional Corp., 801 F.2d 412, 416 (D.C. Cir. 1986); Fine v. Bellafonte Underwriters Ins. Co., 758 F.2d 50, 58 (2d Cir. 1985); Greater Boston Television Corp. v. F.C.C., 463 F.2d 268, 278 (D.C. Cir. 1971), cert. denied, 406 U.S. 950 (1972).

One such circumstance is to prevent an injustice. Coleman v. Turpin, supra, 827 F.2d at 671; Greater Boston Television Corp. v. FCC, supra 463 F.2d at 278-79. Another is to avoid conflicting results. Id. Recall also is proper

where there is a subsequent change in the applicable law or subsequent discovery of facts which materially affects the earlier decision. Braniff Airways, Inc. v. Curtiss-Wright Corp., supra, 424 F.2d at 427 [change in law]; Coleman v. Turpin, supra, 827 F.2d at 671 [discovery of facts].

Whether to grant a motion to recall and/or entertain a second petition for rehearing is properly vested in the discretion of the court of appeals, to be exercised on a case by case basis under the particular facts presented. Zipfel v. Halliburton Co., supra, 861 F.2d at 567; American Iron and Steel Institute v. E.P.A., supra, 560 F.2d at 594-95. The infrequency with which such motions are granted demonstrates that the standards established in these decisions operate fairly and effectively to pro-

mote finality of litigation while allowing for the exceptional case when the interests of justice outweigh that policy. There is no need for this Court to provide guidance in this area.

B. The Submission And Subsequent Denial Of Respondent's Petition For Certiorari Did Not Affect The Court Of Appeals' Power To Recall Its Mandate.

It is not necessary for this Court to determine the effect the pendency of a petition for certiorari has on a court of appeals' jurisdiction to recall its mandate and/or entertain a second petition for rehearing because there is no difference of opinion on that question. The mere filing of a petition has no effect on the lower court's power to recall its mandate. Braniff Airways, Inc. v. Curtiss-Wright Corp., supra, 424 F.2d at 429-30; Glick v. Ballentine Produce, Inc., 397 F.2d 590, 594 (8th

Cir. 1968), United States v. Eisner, 323 F.2d 38, 42 (8th Cir. 1963); Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 296 F.2d 215 (5th Cir.), cert. denied, 368 U.S. 890, reh'g denied, 368 U.S. 936 (1961).

That this is the rule necessarily follows from the nature of this Court's certiorari jurisdiction. As clearly stated in Supreme Court Rule 10.1: "A review on writ of certiorari is not a matter of right, but of judicial discretion [and] will be granted only when there are special and important reasons therefor." A petition for certiorari is simply a request that this Court exercise its jurisdiction over a case. The lower court is not deprived of its jurisdiction unless and until the request is granted. Glick v. Ballentine Produce, Inc., supra, [filing of

petition does not prevent judgment from becoming final]; Kinnear-Weed Corp. v. Humble Oil & Ref. Co., supra.

Petitioners' reliance on Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982) is misplaced. In Griggs, this Court considered the effect a motion for new trial filed in the District Court had on a notice of appeal filed under Rule 4(a), F.R.App.P. This Court held that according to the plain language of Rule 4(a)(4), a previously-filed notice of appeal was without effect. 459 U.S. at 61. The Rule so provides because, unlike this Court's certiorari jurisdiction, a court of appeals' jurisdiction is mandatory and the timely filing of a notice of appeal divests the District Court of its jurisdiction. Id. at 58. There is no such automatic divestment when a petition for

certiorari is filed.[7]

The denial of a petition for certiorari is equally without effect on the court of appeals' power to recall its mandate and/or entertain a petition for rehearing. Such an order merely signifies that less than four members of this Court believe the required special and important reasons for granting the writ exist in the particular case. Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917-19 (1950)(Frankfurter, J., dissenting).

Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (6th Cir.), cert. denied, 389 U.S. 975 (1962)

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7 Petitioners' reliance on F.C.C. v. League of Women Voters, 468 U.S. 364 (1984) is similarly misplaced. In that case, this Court held that Griggs did not apply because F.C.C. was a direct appeal pursuant to 28 U.S.C. §1252 and Rule 4(a)(4) was not applicable. 468 U.S. at 373, n.10. The effect of a petition for certiorari was not even discussed.

and Seese v. Volkswagenwerk, A.G., 679 F.2d 336 (3rd Cir. 1982) are not in conflict with the Instant Decision. Neither case involved a motion to recall the mandate and/or a second petition for rehearing after certiorari had been denied. Therefore, the observation in Deane Hill Country Club that "the denial of certiorari merely specifies that appellate review has been exhausted," 379 F.2d at 326, is not a holding that a court of appeals lacks the power to do what the Court of Appeals did in the Instant Decision. The holding in Seese, that a district court lacks jurisdiction to alter a court of appeals' mandate by way of a motion under Rule 60(b)(6), F.R.Civ.P., does not conflict with the Instant Decision because in this case, the Court of Appeals recalled its own mandate.

C. The Court Of Appeals Correctly Applied The Appropriate Standard of Review.

Petitioners argue that in rendering the Instant Decision, the Court of Appeals did not apply the applicable abuse of discretion standard of review and did not defer to the District Court's supposed findings of fact, as required by Rule 52(a), F.R.Civ.P. This argument does not support a grant of certiorari because it (1) presumes the Court of Appeals applied an improper standard of review when there is no indication in the opinion that such is the case; (2) incorrectly assumes the District Court properly could engage in fact-finding when ruling on the summary judgment motion when in fact it could not have done so under Rule 56, F.R.Civ.P.; and (3) does not demonstrate that the Instant Decision will have any

precedential effect or create any uncertainty in the law given the extraordinary and unique factual background and procedural history of the case. It is not the function of this Court to review lower court decisions which have no impact beyond the particular litigants and do not present legal issues which are likely to arise in the future.

There is no basis for Petitioners' assumption that the Court of Appeals jettisoned the abuse of discretion standard of review applied in the Earlier Decision because that part of the previous opinion is not repeated in the Instant Decision. There was no need for the Court of Appeals to lengthen the Instant Decision unnecessarily by repeating principles of law which were not germane to the issue presented on rehearing. It must be assumed the Court

of Appeals applied the proper standard of review absent compelling evidence to the contrary. Such evidence is not present here. Petitioners would have this Court (1) assume a different standard of review was applied; (2) guess what that standard of review was; and then (3) grant certiorari to determine whether that hypothetical standard of review was proper.

Petitioners next argue that, in violation of the proper role of an appellate court and the clearly erroneous standard of review, the Court of Appeals substituted its own factual determinations for findings of fact supposedly made by the District Court. Astonishingly, Petitioners contend the District Court properly could make factual determinations in ruling on the laches defense even though it had been

presented by way of a motion for summary judgment.

This Court has made it very clear that "judicial fact-finding" (Petn. at 15) is not permitted under Rule 56, F.R.Civ.P. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A court's function is to determine whether a genuine issue of material fact exists. If one does, the motion must be denied. Petitioners do not cite a single decision from this Court or any court of appeals which creates an exception from this rule for summary judgment motions raising the defense of laches.

The evidence of Petitioners' pre-existing knowledge of Respondent and her rights was undisputed, as Petitioners concede (Petn. at 18-19). Whether they could establish cognizable prejudice if the case were allowed to proceed was

thus an issue of law. Cf. E.E.O.C. v. Great Atlantic & Pacific Tea Co., 735 F.2d 69, 81 (3rd Cir. 1983), cert. dismissed 469 U.S. 925 (1984)[whether delay "inexcusable" is conclusion of law]. Where a district court awards summary judgment based upon an erroneous application of law to the undisputed facts, reversal is required. Howes v. Medical Components, Inc., 814 F.2d 638, 643 (Fed. Cir. 1987). The standard of review in such cases is de novo. S.E.C. v. Belmont, Reid & Co., 794 F.2d 1388, 1390 (9th Cir. 1986). Furthermore, a district court abuses its discretion when, inter alia, it commits legal error. Petition of Hill, 775 F.2d 1037, 1040 (9th Cir. 1985); Christian Schmidt Brewing Co. v. G. Heileman Brewing Co. Inc., 753 F.2d 1354, 1356 (6th Cir.), cert. dismissed, 469 U.S. 1200 (1985);

Commonwealth Life Ins. Co. v. Neal, 669 F.2d 300, 303-4 (5th Cir. 1982).

In concluding that the District Court erred in finding Petitioners would be prejudiced notwithstanding their prior knowledge and ability to obtain a declaration of rights at any time after 1974, the Court of Appeals simply held that the trial court had committed legal error in granting summary judgment. That the Court of Appeals believed it was necessary to reconsider its earlier conclusion regarding prejudice because of the Alabama opinion does not mean it used a different standard, went outside the record, or departed from the usual course of proceedings in any other way.

D. The Instant Decision Is Based On Undisputed Facts In The Record On Appeal.

Petitioners incorrectly state that the Court of Appeals went outside the

record on appeal in rendering the Instant Decision. They concede that all the evidence recited in the Instant Decision was part of the District Court record (Petn. at 18). Pursuant to Rule 10(a), F.R.App.P., the "original papers and exhibits filed in the district court . . . constitutes the record on appeal in all cases." Thus, the undisputed evidence, including the three letters which established Petitioners' prior knowledge of Respondent and her potential claims, was part of the record on appeal.

Petitioners confuse the record on appeal with the Appendix prepared pursuant to Rule 30, F.R.App.P. The latter is not the record on appeal, it is only that portion of the record "to which the parties wish to direct the particular attention of the court." Rule 30(a),

F.R.App.P. Respondent was not required to include in the Appendix all the evidence she submitted to the District Court in order to refer to that evidence in her briefs and have it considered by the Court of Appeals: "The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts." Rule 30(a), F.R.App.P. See also, Billings v. Chicago, R.I.& P. RR. Co., 570 F.2d 235, 238 (8th Cir. 1978).

Petitioners concede, (Petn. at 19), that Respondent referred to the evidence mentioned in the Alabama Supreme Court's decision in her briefs to the Court of Appeals. The Court of Appeals quite properly relied on that evidence in rendering the Instant Decision and did not base its decision on "'facts' from outside its own judicial system." (Id. at

18). That the Court of Appeals did not include record references to evidence all parties were aware of does not prove otherwise.

Petitioners' assertion that the Instant Decision resulted from the Court of Appeal's conclusion that they had withheld this evidence from the District Court is based upon a misreading of the opinion. The concealment the Court of Appeals focused on was Petitioners' concealment of the relevant facts from Respondent:

> "The prejudice to [Petitioners] we identified in our prior opinion . . . would not have existed but for the failure of the [Petitioners] to reveal the facts of which they had knowledge. [Petitioners] could have sought a court declaration of their rights vis-a-vis [Respondent]. Instead they chose to remain silent. They should not now be allowed to claim that they are prejudiced by [Respondent's] present assertion of her rights when they were aware of them all along." (App. A at A-1.9).

This holding and the Court of Appeal's earlier statement that "recited evidence in the Alabama court makes clear that [Petitioners] were aware of [Respondent's] rights to the copyright renewals long before [Respondent]" (Id. at A-1.8), demonstrate that the Court of Appeals concluded that Petitioners could not establish the required prejudice because of their pre-existing knowledge of Petitioner and her rights, not because they supposedly withheld evidence from the District Court.

If in fact the Instant Decision resulted from such a misapprehension, Petitioners' remedy was a petition for rehearing under Rule 40, F.R.App.P. Respondent utilized that procedure to advise the Court of Appeals of the errors in the Earlier Decision (App. E-2). Petitioners did not invoke that

remedy and are now requesting this Court to review the voluminous record on appeal to determine whether the Instant Decision contains factual errors. That is not a proper basis for review in this Court.

VII. CONCLUSION

To borrow from Petitioners' Opposition Brief in No. 89-295 (at p.22): "The questions presented for review . . . are not special or important to anyone other than the parties to this action in any manner other than natural academic curiosity and speculation."

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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